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Social Psychology, Calamities, and Sports Law

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SOCIAL PSYCHOLOGY, CALAMITIES, AND SPORTS LAW

MICHAEL A. MCCANN*

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I. INTRODUCTION

This article will ponder the role of situational pressures, fundamental attribution errors, and legal frameworks in how professional sports actors respond to the threat and occurrence of calamities. Both natural and manmade threats to American health are likely to rise over the next decade. Such threats may include catastrophic weather, natural disasters, terrorist attacks, and communicable disease pandemics. In response to these threats, professional sports leagues (“leagues”), professional athletes (“pro athletes” or “players”), fans, and media might engage in unprecedented behavior.

Consider, for instance, increasingly devastating weather patterns, and how they might animate leagues to relocate franchises to cities with more favorable forecasts. The same outcome might arise in the wake of a natural disaster or a terrorist attack. Similarly worrisome, a contagious-disease outbreak abroad might lead to scouting and signing restrictions on foreign players. Closer to home, a disease pandemic or a terrorist attack on a pro sporting event might trigger an in-

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definite cessation of operations.

Professional athletes appear likewise vulnerable to league-transformative responses. For instance, persistent weather effects in the Gulf States might devalue opportunities to play for teams in New Orleans, Tampa Bay, and Miami. Such an effect may already be evident: the National Football League ("NFL") and National Football Players' Association ("NFLPA") are contemplating economic incentives that would facilitate the New Orleans Saints' assuagement of players reluctant to live in a post-Katrina New Orleans. Incidental and deleterious effects, such as the development of property stigma and the exacerbation of racial or cultural tensions, only intensify situational reluctance. Similar, yet amplified, phenomena might arise should terrorist attacks diminish the appeal of playing in targeted cities. The same might be said in the wake of a disease pandemic: players may refuse to travel or protest to play with persons from certain geographies and cultures.

Fans and media are, of course, just as likely to alter their behavior in response to the threat and occurrence of calamities. Most obviously, they may resist attending games should they perceive a sufficient possibility of harm, a phenomenon evidenced during the outbreak of Severe Acute Respiratory Syndrome ("SARS") in 2003. On the other hand, they appear strikingly willing to endure catastrophic weather and natural disasters in order to attend games. Furthermore, they are generally tolerable of intrusive and delaying antiterrorism impositions, such as "pat-downs" and meddling screenings.

Studying the behavior of professional sports actors invites inquiry into the potential effects of judgment errors. Social psychologists and a growing number of legal academics have identified the prevalence of cognitive biases and heuristics in human thinking. Cognitive biases and heuristics are "mental shortcuts" that enable individuals to manage a complex array of stimuli, yet they often distort decision-making in unappreciated ways. Cognitive biases and heuristics comprise part of a broader defect in human perception known as the fundamental attribution error, or a tendency to attribute a causal role to easily-observable yet minimally-influential occurrences, while simultaneously failing to appreciate highly-influential defects in thinking. As a result of the fundamental attribution error, situational happenings—especially those that are dramatically obvious, such as startling weather events, horrific terrorist attacks, and contagious dis-

eases—can meaningfully influence attitudes, memories, cognitions, emotions, and behaviors in unperceived ways.¹

These phenomena beg an obvious question for legal scholars: Can the law be used to mollify the cognitive distortions and situational influences affecting professional sports actors, and can it direct them towards socially-preferred behavior? For instance, can cities employ stadium agreements to prevent weather-weary team owners from hastily relocating their franchises? Can players be contractually-enticed to ignore or discount situational reservations? Can players of foreign nationality contest heightened, possibly xenophobic restrictions on their employment? Can fans contest invasive searches of their body upon entering stadiums? Can media refuse to attend games without jeopardizing their employment?

Broader implications of the same phenomena are even more engaging. Namely, in light of the diversity of American sports, might we consider the behavior of professional sports actors in crisis a bellwether for American behavior in crisis? That is, might a radical change in professional sports operations reflect a radical change in American attitudes and beliefs?

With these questions in mind, this Article will examine external threats to American sports, related situational influences, and past and potential behavioral responses. It will also explore legal safeguards to potentially deleterious behavioral responses, and conclude with general thoughts on professional sports as a proxy for American self-conception.

II. CATASTROPHIC WEATHER, NATURAL DISASTERS, AND PROFESSIONAL SPORTS

In 2005, Americans watched in awe of Mother Nature. Striking with extraordinary fury, Hurricane Katrina devastated New Orleans and the southern coasts of Mississippi and Alabama. The Category 5 hurricane killed 1,321 persons, and displaced over 2 million from their homes.² To date, Katrina has caused over \$150 billion in damages.³ The striking inability of government actors—at the local, state,

1. See generally Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*].

2. See Spencer S. Hsu, *Brown Blames Superiors for Response to Katrina*, WASH. POST, Feb. 11, 2006, at A01.

3. *Id.*

and federal levels—to prepare for and respond to Katrina has proved equally shocking. Indeed, acute criticism of governmental efforts to restore New Orleans persists.⁴

In light of Katrina, many wonder whether the government will enhance its capacity to address severe hurricanes and, more broadly, devastating weather effects. The plausibility of another Katrina-like storm hitting the United States only amplifies this concern. In fact, sea surface temperatures have escalated steadily over the last 30 years, a phenomenon that has raised the frequency of catastrophically-strong hurricanes.⁵ More technically, the proportion of hurricanes reaching Categories 4 or 5 has risen from 20 percent in the 1970s to 35 percent in the past decade, a trend expected to climb.⁶ Although hurricanes tend to run in 30-year cycles, they are expected to become gradually more intense, with stronger winds, longer durations, more rainfall, and less predictable paths.⁷

Of course, the warming of sea surface temperatures reflects a broader ecological phenomenon: the Greenhouse effect, or the rise in Earth temperatures resulting from an increase of atmospheric gases that repress reflected heat.⁸ Because of the Greenhouse effect, many scientists project a higher frequency of “extreme” and hazardous

4. *Id.*; see also Bob Schieffer, *Newt Gingrich Discusses Political Issues*, FACE THE NATION TRANSCRIPT, Jan. 1, 2006, available at Lexis/Nexis News Wire (Gingrich calling response to Hurricane Katrina a “failure of government”); Charles Peters, *Titling at Windmills*, WASH. MONTHLY, Oct. 1, 2005, at 8 (“The Katrina response was not a failure of government; it was a failure of bad government”); Jonathan Weisman & Michael Abramowitz, *Katrina’s Damage Lingers for Bush*, WASH. POST, Aug. 26, 2006, at A01 (asserting that President Bush’s handling of Hurricane Katrina, and particularly the image of him staring outside the window of Air Force One as it was thousands of feet above New Orleans, may reflect the nadir of his presidency). For a related legal account, see generally Kevin Kennedy, *What the Weather Can Teach Us About the Unfair Trade Remedy Laws: the Lessons of Hurricanes Katrina, Rita, and Wilma*, OCCASIONAL PAPERS INT’L TRADE & POL’Y (2005).

5. See Good Morning America, *Heating Up Polar Ice Caps Melting*, ABC NEWS TRANSCRIPTS, Sept. 28, 2005, available at Lexis/Nexis News Wire.

6. See Fred Pearce, *Warning World Blamed for More Strong Hurricanes*, NEW SCIENTIST, Sept. 15, 2005, available at Lexis/Nexis News Wire. As a separate measure, Professor Kerry Emanuel of the Massachusetts Institute of Technology finds that there has been a 50 percent increase in the destructive power of hurricanes over the last century. *Id.* As a matter of background, hurricanes can form when ocean temperatures rise above 78.8 degrees Fahrenheit and the warmer the water, the stronger the storm. *Id.*

7. See Fred Pearce, *The Gathering Storm*, NEW SCIENTIST, Dec. 3, 2005, at 36.

8. See Kerry Emanuel, *Increasing Destructiveness of Tropical Cyclones over the Past 30 Years*, NATURE, July 30, 2005 (citing research by Professor Emanuel concerning the link between rising sea temperatures and global warming); see also Jennifer Woodward, *Turning Down the Heat: What United States Laws Can Do To Help Ease Global Warming*, 39 AM. U.L. REV. 203 (1989) (providing extensive analysis of the Greenhouse Effect).

weather in the coming years.⁹ Despite these ominous projections, lawmakers and citizens appear largely unwilling to engage in corrective environmental reform.¹⁰

Natural disasters, and especially earthquakes, present a related mode of analysis. Although inherently unpredictable, earthquakes in "geographic hot spots" are considered especially possible and potentially destructive. Seismologists perhaps most fear a catastrophic earthquake on the San Andreas Fault in California.¹¹ Should it occur, it would endanger the lives of millions of Californians and likely cause billions of dollars in property damage.¹² It would also dramatically alter the topography and habitability of our nation's most populous state.

Effects of catastrophic weather and natural disasters on American professional sports have already manifested. Wildfires, for instance, have forced relocations of professional sporting events. Consider the October 2003 wildfires in San Diego, which propelled that city's mayor, Dick Murphy, to ask the NFL to relocate a scheduled game between the Miami Dolphins and the San Diego Chargers.¹³ Although Qualcomm Stadium was not endangered, its parking facility was used as a location for evacuated residents to obtain food and water.¹⁴ Mayor Murphy also expressed concern that playing the game would divert city resources from protecting the lives and property of San Diego residents.¹⁵ Unsurprisingly, the NFL, with the consent of the NFLPA, granted the request and relocated the game to Tempe,

9. See Robin McKie, *Irrigation Creates World Water Crisis*, OBSERVER, Feb. 25, 2001, at 23 (citing World Health Organization report); see also Mike Toner, *Major Storms Become More Frequent: Hurricane Data Suggest Link to Global Warming*, ATLANTA J.-CONST., Sept. 16, 2005, at 1D (citing remarks by Peter Webster of Georgia Tech's School of Earth and Atmospheric Sciences concerning parallel increase in worldwide storms and predictions for warmer world).

10. See Kristen H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 186 (2005).

11. See Bill Mongelluzzo, *Preparing for the Big One*, J. COMMERCE, Oct. 10, 2005, at 18.

12. See *Quake Damage Estimates Rise*, INSURANCE ACCOUNTANT, July 10, 1995, at 8, available at Lexis/Nexis News Wire (describing research of Haresh C. Shaw that projects that an earthquake of an 8.3 magnitude on the Richter Scale would cause up to \$225 billion in economic damages); see also *Rethinking the Catastrophe Risk*, ERNEST & YOUNG, May 1, 1996, at Lexis/Nexis News Wire (describing models that project insured earthquake losses of \$70 to \$75 billion).

13. See Craig Dolch, *Game Moved to Arizona*, PALM BEACH POST, Oct. 27, 2003, at 8C.

14. Add footnote

15. Add footnote

Arizona.¹⁶

Blizzards present a related public safety concern, and thus likewise direct professional sports teams to reschedule games. For instance, upon learning of an impending blizzard in January 1996, the National Basketball Association ("NBA"), in consultation with relevant team officials, postponed a game between the New Jersey Nets and Atlanta Hawks.¹⁷ The same snow storm led the NBA to postpone a Seattle Supersonics-New York Knicks contest.¹⁸ These decisions appeared reasonable considering that states of emergency had been declared in both New Jersey and New York. Some speculated that financial interests were also salient, since had the games been played, attendance would have been abnormally low, and thus parking fees, concession sales, and other in-game revenue would have suffered.¹⁹

Perhaps the most vivid illustration of catastrophic weather and natural disasters affecting professional sports occurred in 2005, when following the mass evacuation of New Orleans, the New Orleans Saints and Hornets relocated their franchises for the 2005 NFL season and the 2005-06 NBA season, respectively.²⁰ The Saints played their home games in San Antonio and Baton Rouge, while the Hornets played their home games in Oklahoma City.²¹ The Saints will return to New Orleans for the 2006 NFL season; the Hornets will play 35 of their 41 home games in Oklahoma City and the other six in New Orleans in the 2007-07 NBA season.²² Collectively-bargained economics partly explain the return of the Saints and the eschewal of the Hornets. Approximately 40 percent of all NFL ticket revenue is evenly divided among the 30 teams, meaning that an individual NFL team can withstand diminished attendance (assuming league-wide attendance remains sufficient).²³ In contrast, NBA teams do not share

16. *Id.*

17. See Michael James, *Nets Given a Vacation*, N.Y. DAILY NEWS, Jan. 8, 1996, at 53.

18. See Sheldon Spencer, *Blizzard Postpones Sonics Game*, SEATTLE POST-INTELLIGENCER, Jan. 8, 1996, at D1. Perhaps Canadians are indeed better at handling the snow, as instead of postponing games, the Canadian Football League has been known to alter field dimensions and game rules in order to accommodate snow conditions. See Jonathan Huntington, *Last-Second History: Eskis have had a Few Nailbiters in their Season-Ending Catalogue*, EDMONTON SUN, Nov. 5, 2005, at SP4 (describing game in 1991 between the Edmonton Eskimos and the Winnipeg Blue Bombers).

19. *Id.*

20. Add footnote

21. Add footnote

22. See *Hornets Extend their Stay*, L.A. TIMES, Feb. 1, 2006, at D6.

23. Add footnote

gate receipt revenue and are thus far more dependent on locally generated revenue.²⁴

The putative return of the Saints highlights the lingering effects of catastrophic weather and natural disasters. Though the return may lift the spirits of New Orleans' inhabitants, it appears remarkably qualified and even tentative. Tellingly, remarks by outgoing NFL Commissioner Paul Tagliabue suggest a league reluctance to commit to New Orleans beyond one-year, and even that year appears materially conditional. "[T]here are a lot of things that have yet to be accomplished before we can be certain that it will be a multiyear effort . . . based on the information we have now, it is too early to tell."²⁵ Tagliabue's concerns seem validated by the Saints' ongoing struggles to sell luxury suites and corporate sponsorships for the 2006 season, as much of the New Orleans business community appears either unable or unwilling to embrace the team's return.²⁶ Perhaps more significantly, his doubts reflect broader unease over the social upheaval and economic devastation suffered by New Orleans, and its uncertain prospects for recovery.

The geographic instability of the Saints and Hornets' franchises has triggered myriad emotions among team personnel. Most apparently, a number of Saints' players have expressed frustration over playing in multiple "home" venues and practice facilities during the 2005 NFL season, as well as dismay at the team's mere tentative return to New Orleans.²⁷ Other misgivings include the fear of another catastrophic hurricane hitting New Orleans, and lack of suasion over the franchise's plight.²⁸ To illustrate, defensive end Will Smith re-

24. See Benjamin Hochman, *Two Teams, Too Much*, TIMES-PICAYUNE, Feb. 12, 2006, at 12.

25. See Tom Osborn, *Goodbye—for now, at least*, SAN ANTONIO-EXPRESS, Dec. 31, 2005, at 1A. Tagliabue's sentiments appeared unchanged in August 2006, when he said that it was "still an open question" as to whether the Saints would remain in New Orleans. See Michael McCarthy, *Going out on a Swing*, USA TODAY, Aug. 22, 2006, at 1C.

26. See Jim Corbett, *Saints Tackle New Challenges*, USA TODAY, June 29, 2006, at 1C. However, since returning to New Orleans, the Saints have established a franchise record for season tickets sold. Although these sales may reflect an ephemeral "rally-around-the-city" effect, they nevertheless suggest that Saints' fans in New Orleans still care deeply about their team. *Id.*

27. Saints quarterback Aaron Brooks even threatened to quit the team during the season due to the team's nomadic and uncertain plight. See Joe Menzer, *Saints' Season is Upheaval, Uncertainty*, WINSTON-SALEM J., Dec. 17, 2005, at C8.

28. See e.g., Tammy Nunez, *Saints May Have Made their Last Stand in Louisiana*, TIMES-PICAYUNE, Dec. 19, 2005, at 5 (citing remarks by Aaron Stecker). Ironically, or perhaps fittingly (depending on your viewpoint), the Saints drafted Bush with the second overall

cently bemoaned that “everybody feels like we were treated like children [by the NFL].”²⁹

Similarly meaningful, prospective selections in the 2006 NFL draft, such as Reggie Bush of the University of Southern California, openly rued the thought of being drafted by the Saints.³⁰ Financial advisors to those players were more critical. According to one, “from a marketing standpoint, it would be terrible. There’s not even a city to market the player to.”³¹ To illustrate this “marketing concern,” consider that with the New Orleans business community decimated, fewer sponsors may be interested in tie-ins with the team or its players.³²

On the other hand, the NFL, the NBA, and their respective players’ associations evince a willingness to counteract some of these locale-related concerns. Most demonstrably, the NFL and NFLPA paid each Saints player a \$40,000 bonus in December 2005 for “performing under unusual and unanticipated conditions arising from the Hurricane Katrina tragedy.”³³ They also contemplated the offering of financial assistance to players who sign with the Saints during the 2006 off season, a period when teams may sign free agent players.³⁴ Significantly, NFL observers posit “post-Katrina hesitance among free agents to remain with or join [the Saints]” as likely animating.³⁵ Moreover, several Saints players have stated, off-the-record, that they would not remain with the team if given a choice.³⁶ Enhanced finan-

pick in the 2006 NFL draft.

29. See Mike Finger, *Players Split About Saints’ Adieu*, SAN ANTONIO-EXPRESS, Dec. 31, 2005, at 1C.

30. For instance, University of Southern California star Reggie Bush recently said of possibly being drafted by the Saints, “It’s a tough situation. When that time comes I’ll deal with it.” See Billy Witz, *Road to Nowhere?*, DAILY NEWS OF LOS ANGELES, Dec. 30, 2005, at S1; see also Brent Schrottenboer, *Marketers see Green over Bush Potential*, SAN DIEGO UNION-TRIB., Jan. 3, 2006, at D1 (describing New Orleans as “[not] exactly a launching pad right now for individual marketing potential”). Ironically, Bush was drafted by the New Orleans Saints. See *2006 NFL Draft*, NFL.COM, available at <http://www.nfl.com/draft/drafttracker/round/round1> (last visited Aug. 26, 2006).

31. See Witz, *supra* note 24.

32. *Id.* (citing remarks by Paul Swangard, director of the Warsaw Sports Marketing Center at the University of Oregon).

33. See *NFL Giving Saints Performance Bonuses*, NFL.COM, Dec. 14, 2005, at <http://www.nfl.com/teams/story/NO/9096888>.

34. See Jeff Duncan, *NFL Looking at Options to Help New Orleans Attract Free Agents*, TIMES-PICAYUNE, Nov. 17, 2005, at 1..

35. See Dan Uthman, *Wanted: Winning Coach*, OREGONIAN, Jan. 3, 2006, at D01.

36. See Witz, *supra* note 24.

cial benefits to those who sign or re-sign with the Saints might work to assuage such trepidations.³⁷

It remains uncertain whether these prospective benefits materialize or prove sufficient.³⁸ In January 2006, it was thought that the Saints' ability to re-sign its only Pro Bowler, center LeCharles Bentley, would prove foretelling.³⁹ Bentley's agent, Peter Schaeffer, shed intriguing light on his client's decision-making process: "Right now, there's just not enough information. From a player's perspective . . . you want a stable situation, great homes, a family atmosphere - they're going to want to have that in place."⁴⁰ Unfortunately for the Saints, Bentley signed with the Cleveland Browns on March 11, 2006, only hours after the start of free agency.⁴¹ At that time, media wondered whether "the Saints may have a tough sell bringing stars to hurricane-ravaged New Orleans."⁴² Days later, however, the Saints signed heralded free agent quarterback Drew Brees, who spoke favorably of the opportunity to live in a recovering New Orleans.⁴³ Then again, in signing Brees to a six-year, \$60 million contract, the Saints offered him considerably more than any other team.⁴⁴ Suggestively, therefore, enhanced compensation as a "trade-off" for players seeking a stable, comfortable place of employment may impose significant financial burdens on locale-disadvantaged teams. Such a finding would appear consistent with my scholarship on the influence of non-monetary motivations on player decision-making.⁴⁵

37. See Duncan, *supra* note 28.

38. As of April 30, 2006, the NFL and NFLPA had not instituted any special incentives for free agents to sign with the Saints, but were said to have "discussed ways to aid the team in free agency." See Mike Triplett, *Room to Grow*, TIMES-PICAYUNE, Mar. 2, 2006, at 1 (citing remarks by Saints General Manager Mickey Loomis). There are no indications that the any financial assistance is forthcoming.

39. See Witz, *supra* note 24.

40. *Id.*

41. See James Walker, *Bentley Tops Browns Signings*, COLUMBUS DISPATCH, Mar. 12, 2006, at 16E.

42. E.g., Harvey Fialkov & Alex Marvez, *Brees a Wanted Man*, ORLANDO SENTINEL, Mar. 12, 2006, available at <http://www.orlandosentinel.com/sports/football/pro/dolphins/sfl-dol12mar12,0,2014691.story?coll=orl-dolphins>.

43. See Jim Mashek, *Newest Saint Drew Brees ready to put the doubts behind him*, SUN HERALD, Mar. 15, 2006, at Sports.

44. Many teams were concerned by Brees' recent shoulder surgery, yet the Saints appeared content with his shoulder's status. See Mike Triplett, *Fresh Brees*, TIMES-PICAYUNE, Mar. 15, 2006, at 1.

45. See generally Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases and Heuristics Among Professional Athletes*, 71 BROOKLYN L. REV. 1501 (forthcoming, 2006) (draft available at <http://papers.ssrn.com/abstract=822864>) [herein-

The uncertain willingness of players to sign with the New Orleans Saints—perhaps even at financial premiums—may illuminate a broader concern for pro sports leagues: Will catastrophic weather and natural disasters trigger lasting player movements away from certain franchises, thus rendering those franchises incapable of fielding competitive teams? Significantly, the “stigma” now associated with New Orleans appears considerable and perhaps enduring. Through television, the nation observed unthinkable scenes: persons drowning in their attics, bodies floating in flooded streets, mass hysteria, lawlessness, and surrounding communities refusing New Orleans residents safe passage out-of-the city. The list of frightening, even inhuman images could extend for pages. Along those lines, will Saints players and team employees want to return to the Superdome, the very same facility which precariously “housed” 23,000 evacuees?⁴⁶

The enduringness of these images comports to socio-psychological expectations of stigma, or the “social marker” labeling a particular person, entity, or concept as deficient or deviant.⁴⁷ Such a marker may dramatically alter perception of emotion, thought, and behavior, with the stigmatized object suffering behavioral consequences, such as inferior treatment, repudiation, or censure.⁴⁸ Reputational damage can arise immediately upon the marker’s attachment, a phenomenon only exaggerated by the human tendency to “assume that people deserve what happens to them.”⁴⁹ Perhaps most troubling, these phenomena often endure due to the “self-fulfilling prophecy effect,” whereby external actors elicit behavior from the stigmatized object that tends to confirm the stigma.⁵⁰

Significantly, stigma has been evidenced in the context of property and locale, as once marked by any perceived “contamination,”

after McCann, *It's Not About the Money*].

46. See Mike Hasten, *Board looking closer at Superdome contract*, TIMES, Oct. 22, 2005, at 1A (describing conditions in Superdome).

47. See Alex Geisinger, *Nothing but Fear Itself: A Social- Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 476 (1997).

48. *Id.* citing EDWARD E. JONES ET AL., SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS 4-7 (1984).

49. *Id.* citing MICHAEL R. EDELSTEIN, CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE 14 (1988); see also Lu-in Wang, *The Transforming Power of “Hate”*: Social Cognition Theory and the Harms of Bias-Related Crime, 71 S. CAL. L. REV. 47, 91-92 (1997) (describing how people tend to regard outcomes as attributable to choice rather than chance).

50. See Bruce J. Winick, *The Side Effects of Incompetency Labeling*, 1 PSYCH. PUB. POL. & L. 6, 10 (1995).

such property or locale will suffer diminution to its status.⁵¹ Moreover, due to “courtesy stigma,” entities associable with the property or locale (such as residents or businesses) may encounter stigma by their mere association.⁵² For that reason, sheer circumstance and unintended coincidence may compel associable entities to share in the stigmatizing discredit. Because of their association with New Orleans, the Saints and Hornets may therefore resemble less appealing employment venues, and that disesteem may persist because of stigma’s enduringness.

Racial dynamics also appear relevant when assessing the capacity of New Orleans teams to attract players. Indeed, the lasting images of Katrina—the stranded, hungry, dehydrated, and predominantly African-American New Orleans residents clinging to life while the government appeared peculiarly focused on preventing “looting” and other property damage—might impair the Saints and Hornets’ recruitment of African-American players, who comprise nearly 80 percent of all NFL and NBA players.⁵³ Other images may have exposed underlying racial tensions, such as the neighboring and predominantly white community of Gretna closing a bridge that would have supplied safe passage for thousands of African-American stuck in New Orleans,⁵⁴ or the decision of the nearly all-white parish of St. Bernard, which borders the nearly all-African-American Lower 9th Ward, to line rail cars across the roads as a blockade.⁵⁵ Significantly, social psychologists find that images, both actual and imagined, can prove strikingly influential in decision-making processes.⁵⁶ For that reason, images associable with racism might affect player interest in the Saints and Hornets.

Such a deduction has been suggested in other settings. Perhaps most famously, African-American athletes have sometimes expressed unwillingness to play for Boston sports teams due to the memory of specific racial incidents, such as the Red Sox refusing to work out

51. See Geisinger, *supra* note 41, at 476.

52. See Edelstein, *supra* note 43, at 180.

53. See Dave Krieger, *Fact or F(R)iction?*, ROCKY MOUNTAIN NEWS, Oct. 27, 2005, at 2C (noting that nearly 80 percent of NBA players are African-American); see also Michael I. Ninman, *Katrina's America: Failure, Racism, and Profiteering*, HUMANIST, Nov. 1, 2005, at 11 (commentating on the effects of Katrina on race relations in New Orleans).

54. See Tim Jones, *Town Defends Closing Bridge to Safety*, CHI. TRIB., Oct. 10, 2005, at 11.

55. See Howard Witt, *Suspicious Fire Racial Tensions*, CHI. TRIB., Dec. 22, 2005, at 1.

56. See generally McCann, *It's Not About the Money*, *supra* note 39.

Willie Mays in 1949 or, in 1990, white police officers surrounding the Celtics' Dee Brown with their guns drawn and then forcing him to the ground because they had confused him with a robbery suspect.⁵⁷ Indeed, Barry Bonds has said that he would never play in Boston because of past racial incidents,⁵⁸ while others, such as Marquis Grissom and David Justice, are thought to have negotiated no-trade clauses to the Red Sox for similar concerns.⁵⁹ Equal meaningful, these perceptions have lingered in spite of concerted efforts by Boston's sports franchises to combat perceived racial insensitivity.⁶⁰ Suggestively, therefore, attempts by the Saints and Hornets to distance themselves from racially-motivated incidents during Katrina may prove inefficacious.

Optimism bias also appears relevant when assessing the role of catastrophic weather and natural disasters in professional sports, and particularly when considering the future of the Saints and Hornets in New Orleans. Optimism bias posits that individuals assume that general risks do not apply with equal force to themselves⁶¹ or, more simply, that "good things are more likely than average to happen to us and bad things are less likely than average to happen to us."⁶² For instance, because of optimism bias, the average American estimates a one in five chance of personally being the victim of a violent crime, yet believes that the average American has about a two in five chance

57. See Mike Freeman, *Bonds Right About Racism in Beantown*, FLORIDA-TIMES UNION, June 25, 2004, at C1 (describing arrest of Dee Brown); see also Michael Arace & Jim Shea, *Celtics Say Perception of Prejudice Off Base*, HARTFORD COURANT, Dec. 19, 2002, at F1 (discussing ESPN poll where readers considered the Celtics to be the franchise most likely to chose their players on the basis of race rather than ability); Sharon O'Brien, "We Want a Pennant, Not a White Team": How Boston's Ethnic and Racial History Shaped the Red Sox, in JOHN BLOOM & MICHAEL NEVIN WILLARD, *SPORTS MATTERS: RACE, RECREATION, AND CULTURE* 168-83 (2002) (examining role of Boston Irish Catholics in unwillingness of the Boston Red Sox to sign African-American players).

58. *Id.*

59. See Gordon Edes, *Duquette Takes another Hit*, BOSTON GLOBE, May 24, 1997, at G3.

60. See e.g., Larry Whiteside, *Neither the Celtics nor Red Sox fit into Racist Mold*, BOSTON GLOBE, Dec. 25, 1992 (describing efforts by Boston Red Sox and Boston Celtics to improve African-American opinion of their franchises).

61. See Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1511-12 (1999); see also Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995) (finding that "as a systematic matter, people are unrealistically optimistic").

62. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091 (2000).

of being one.⁶³

In the context of New Orleans, optimism bias may have been present when the government promised a complete and prompt recovery—"to do what it takes," in the words of President George W. Bush⁶⁴—followed by a profoundly gauche and disjointed recovery effort.⁶⁵ As of this writing, many displaced persons lack temporary housing and many business owners await government loans that were promised months earlier.⁶⁶ At the same time, the streets are still littered with tons of debris,⁶⁷ and only a third of the city's structures have electricity and even fewer enjoy hot water and coking gas.⁶⁸ Equally troubling, New Orleans features only one full-service emergency room, which is so congested that patients can wait as long as six hours before receiving "emergency" care.⁶⁹ Similarly worrisome, there persist myriad reports of lawlessness.⁷⁰ Speculatively then, perhaps the Saints' return to the New Orleans for the 2006 NFL season reflects a bit of underappreciated risk, hubris, and exaggerated hope.

The above analysis is not intended to suggest that New Orleans cannot recover from Hurricane Katrina and return to its status as one of the nation's most popular cities. However, the apparent impulse to "rush" sports franchises back to the city may only diminish the probability of those franchises remaining there. As described above, the potential for stigma to remain attached to both property and people

63. See Neal R. Feigenson, *Responsibility and Blame: Psychological and Legal Perspectives: Emotions, Risk Perceptions and Blaming in 911 Cases*, 68 BROOKLYN L. REV. 959, n. 82 (2003).

64. See Silla Brush & Bret Schulte, *Fiscal Disaster Down on the Bayou*, U.S. News & World Report, Nov. 21, 2005, at 27.

65. See Mark Silva, *Bush: Katrina Recovery Hits "Some Rough Spots,"* CHI. TRIB., Jan. 13, 2006, at 11.

66. *Id.* In fact, almost one-quarter of all jobs in New Orleans have been lost, and the city anticipates a housing deficiency of 84,000 housing units in 2006 and 102,000 housing units in 2008. See James A. Richardson, *What's Needed for Post-Katrina Recovery*, LOUISIANA STATE UNIVERSITY, Mar. 10, 2006, available at <http://www.fsround.org/pdfs/RichardsonStudy-FINAL.pdf>. Many of these jobs, and particularly those in the professional and business services sector and wholesale and retail trade sector, are unlikely to return.

67. *Id.*

68. See Rukmini Callimachi, *6 Months Later, New Orleans Far from Whole*, AP, Feb. 25, 2006, available at http://www.boston.com/news/nation/articles/2006/02/25/6_months_later_new_orleans_far_from_whole/ (last visited Aug. 26, 2006).

69. See *New Orleans Ambulances Play Waiting Game*, WESH.COM, Feb. 10, 2006, available at <http://www.wesh.com/health/6907472/detail.html>.

70. See Michael Perlstein, *Police Reports Conceal Looting*, TIMES-PICAYUNE, Feb. 7, 2006, available at <http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-5/1139296077325360.xml>.

suggests an obvious need to diminish images that exacerbate stigma. Moreover, the recovery of New Orleans remains a work-in-progress, with adequate hospital care and other essential components of a modern American city still unachieved. For these reasons, New Orleans should probably first establish a visually stable and credible locale before its sports franchises claim a permanent return. Devoted local ownership would only further abate stigma, as it would dissuade unease that a short-term delay in returning would forecast an ultimate departure from New Orleans. Nevertheless, the NFL has elected to return the Saints to New Orleans in 2006, even with an ownership group that some believe would prefer to relocate the franchise.⁷¹

Though instructive, the New Orleans example only touches on broader concerns of catastrophic weather and natural disasters on professional sports. Consider, for instance, how professional sports leagues might respond to greater frequencies of catastrophic weather and natural disasters in particular geographic settings, such as if coastal communities were projected to endure more frequent and damaging hurricanes. Certainly, leagues may be weary of awarding new franchises to geographically vulnerable areas, as available public financing for sports and other non-essential expenditures would likely plummet. Indeed, professional sports teams tend to rely heavily on local tax revenue to finance new facility costs, with taxpayers typically financing two-thirds of the cost of new professional sports facilities.⁷²

More controversially, leagues may consider relocating franchises to "less vulnerable" areas of the country, particularly if population groups and business actors were to gradually migrate away from vulnerable communities. Such shifts are plausible, as socio-economists find that "people are willing to pay indirectly for local amenities, such as good weather . . . in the form of higher rents and lower wages."⁷³ History also proves indicative: when contemplating relocation, fran-

71. See e.g., Joanne Korth, *Wanted: Place to Call Home*, ST. PETERSBURG TIMES, Dec. 2, 2005, at 1C (discussing reports that Saints' majority owner Tom Benson would prefer to move the franchise to San Antonio); Joseph Nocera, *Take the Money and Stay*, N.Y. TIMES, Feb. 5, 2006, at 68 (describing Benson's strong business and personal ties to San Antonio, as well as the population and economic growth of San Antonio, as evidence of his desire to move the Saints to there); Scott Ferrell, *Arnold Fielkow's Firing Not a Good Sign for New Orleans Saints Fans*, TIMES, Oct. 19, 2005, at 1C (noting how Benson fired a team executive for publicly stating a preference that the Saints remain in Louisiana).

72. See Gerald A. Carlino & Edward N. Coulson, BUSINESS REV., June 22, 2004, at 7 (citing analysis by economist Raymond Keating).

73. *Id.*

chises routinely consider such criteria as population trends, demographics, average income, and the number of local corporations able to purchase luxury seating.⁷⁴ Likewise, social psychologists identify the salience of "groupism" in human movement, as humans and economic entities more often move with others than by themselves, meaning population shifts might stimulate large population segments and business actors to follow.⁷⁵ Taken together, economic and psychological deductions suggest that as locales diminish in appeal, people and businesses will move from them, and economic incentives and situational pressures will similarly lead sports teams out-of-town.⁷⁶

On the other hand, one might ask, if population groups indeed move in fear of natural calamities, then why has California's population only surged in spite of persistent threats of catastrophic earthquakes? In fact, California is now home to over 35 million persons, a startling 15 million increase over the last 15 years.⁷⁷ Moreover, demographers believe that California's population will rise to over 45 million persons by 2030.⁷⁸ The state of Florida presents a more compelling case-study: despite ominous warnings in 1990 of increased hurricane activity,⁷⁹ and despite a fruition of such warnings over the next decade,⁸⁰ Florida's population increased by 20 percent from

74. See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 945 (1999); see also Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 664 (1989) (explaining relevance of demographic analysis in assessment of locale viability for Major League Baseball teams).

75. See generally Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003) (discussing influence of group dynamics on human behavior).

76. Then again, some posit that franchise relocations in and of themselves diminish overall fan interest in particular leagues, as such relocations reveal to fans the potential ephemeral nature of local fandom. See generally JEFFREY DALTON JAMES, *BECOMING A SPORTS FAN: UNDERSTANDING COGNITIVE DEVELOPMENT AND SOCIALIZATION IN THE DEVELOPMENT OF FAN LOYALTY* (1997).

77. See 2000 Cal Facts California's Demographics, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, Dec. 2000, available at http://www.lao.ca.gov/2000/calfacts/2000_calfacts_demographics.html

78. See California Population, NEGATIVE POPULATION GROWTH, <http://www.npg.org/states/ca.htm> (last visited Aug. 26, 2006).

79. See William M. Gray, *Strong Association between West African rainfall and U.S. landfall of intense hurricanes*, SCIENCE, Sept. 14, 1990, at 1251.

80. See Joni Jones, *Citizens Failed to Enforce Penalties*, ST. PETERSBURG TIMES, Dec. 23, 2005, at 1A (noting increased hurricane activity in Florida over recent years); see also *Testimony by Pamela Duncan*, Legislative Affairs Director with the Florida Department of Community Affairs, before the House Committee on Banking and Financial Services Subcommittee on Housing and Community, July 12, 1999, available at Lexis/Nexis News Wire (discussing extensive hurricane damage in Florida from 1992 to 1999).

1990 to 2000, almost double the percentage increase of the U.S. population.⁸¹ Although both California and Florida may represent uniquely desirable locales, and although possibly affected by optimism bias, their recent demographic experiences suggest that “fear of disaster” may not propel population movements. Only strengthening this point in the context of professional sports is the commonly expressed desire of pro athletes to play for teams in California and Florida.⁸²

Consider also the striking resilience of fans to support their teams in spite of natural obstacles. Routine examples may be found on any given Sunday, in any given December, in places like Foxboro, Massachusetts, Pittsburgh, Chicago, Kansas City, Green Bay, and Buffalo, where fans appear more than willing to brave dangerous blizzard conditions in order to watch their NFL teams play, even when they probably would not undertake the same health hazard for other life activities.⁸³

More dramatic and singular instances also prove instructive. Take, for instance, the 1989 World Series between the Oakland Athletics and the San Francisco Giants. It was interrupted by an earthquake that killed over 60 persons in San Francisco,⁸⁴ and despite fears of additional quakes, fans responded by filling the stadium for the remaining games.⁸⁵ Social commentators criticized Major League Baseball for a lack of sensitivity in continuing with the Series,⁸⁶ yet the outpouring of fans, coupled with the absence of additional quakes, appeared to validate the league’s decision. Granted, as some critics

81. See *Florida Demographic Summary 2000*, FLORIDA BUSINESS DATA, <http://www.florida-business-data.com/demographics-state-summary.htm> (last visited Aug. 26, 2006).

82. See e.g., John Lowe, *Sense of Loss Creeps into Tigers’ Winter*, DETROIT FREE PRESS, Dec. 17, 2004, at 1E (describing how outfielder Steve Finley told the Detroit Tigers that he preferred to play in California, despite the Tigers’ lucrative offer); see also McCann, *It’s Not About the Money*, *supra* note 39, at 1537 (describing effects of weather preferences among professional athletes).

83. See e.g., Michael S. Rosenwald, *Patriots Fans have Zeal to Keep Selves Warm*, BOSTON GLOBE, Jan. 9, 2004, at A1 (describing how Patriots fans do not mind the snowy conditions for games).

84. See *2 More Bodies Found in Ruined Highway’s Rubble*, N.Y. TIMES, Nov. 1, 1989, at B6.

85. See Joe Gergen, *Many Happy Returns*, NEWSDAY, Oct. 28, 1989, at 35.

86. See e.g., Moss Klien, *NFL Lesson in ‘63 Should have Guided Vincent*, THE SPORTING NEWS, Oct. 30, 1989, at 47 (concluding, “despite their good intentions, Commissioner Fay Vincent and league officials should have canceled the Series, conceding that the tragedy caused by the earthquake made the continuation offensive”).

asserted, the games may have served more as a situational distraction than an expression of fortitude.⁸⁷ That particular criticism reflects a broader social critique that when sports fans flock to games in times of crisis, and when society applauds their behavior, a human vulnerability to escapism emerges: "In the immediate aftermath of disaster, we are always told that the games must go on. Not simply because that's the normal order of business. But because the games provide a welcome diversion that suffering people desire . . . graveside looks soon turn into painted faces and mournful laments are replaced by howls of delight."⁸⁸ Moreover, when juxtaposed with the plight of New Orleans, the human suffering and cost triggered by the San Francisco earthquake doubtless paled in comparison to that triggered by Katrina. Nevertheless, sports leagues might infer confidence from the response of the Bay community when contemplating the future of franchises in New Orleans and, more broadly, the sustainability of professional sports franchises in areas affected by catastrophic weather and natural disasters.

Perhaps the strongest "anchor" of a professional sports team to a particular location in crisis rests in the legal nexus between franchises and host governments. Although government and league machinations to prevent franchise owners from relocating their franchises have typically been found to violate Section I of the Sherman Anti-trust Act,⁸⁹ the Lanham Trademark Act⁹⁰ furnishes governments with considerable authority to reserve some ownership of team names and associated images.⁹¹ Through certain stadium lease agreements, cities

87. See Bill Lyon, *It's an Insult to Continue this World Series*, KNIGHT-RIDDER NEWS SERV., Oct. 20, 1989, available at Westlaw News Wire.

88. See Bob Molinaro, *Once Again, We're Forced to Put Sports in Perspective*, VIRGINIAN-PILOT, Sept. 6, 2005, at C1. For a more positive perspective on the same phenomenon, see Jenni Carlson, *Tournament Provides us a Diversion*, DAILY OKLAHOMAN, Mar. 19, 2003, at 1C (describing the NCAA March Madness tournament as, "It is our oasis. The games must go on. We need the wackiness, the craziness, the insanity to balance the reality of these days. President Bush on the television. Troops at the front. Guns at the ready. Games won't make us forget these things but may help us cope with them").

89. 15 U.S.C. 1 (2001); For examples of teams relocating without league or city permission, see *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F. 2d 1381, 1383 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984) (Los Angeles Raiders moving to Oakland); *NBA v. SDC Basketball Club*, 815 F.2d 562 (9th Cir. 1987) (San Diego Clippers moving to Los Angeles).; see also Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157 (1984) (supplying overview of antitrust law and franchise relocation).

90. Lanham Trademark Act, ch. 540, 60 Stat. 427 (1942) (codified as amended at 15 U.S.C. 1051-1127 (2003)).

91. See Don Nottingham, *Keeping the Team at Home: Antitrust and Trademark Law as*

and other governmental actors may also inhibit or substantially delay any breach of contract.⁹² Moreover, even when those governmental actors lack sound legal bases to foil franchise relocation, the mere threat of costly and controversial litigation can prove sufficiently deterring.⁹³ Although the Saints are not legally anchored in New Orleans, the Hornets may be.⁹⁴ More broadly then, legal anchors illuminate a potentially useful tool for communities to preserve their teams in spite of catastrophic weather and natural disasters.

Taken together, an analysis of professional sports in settings of catastrophic weather and natural disasters suggests an intriguing framework: theoretical applications of economics and social psychology intimate that franchises may suffer by remaining in geographically vulnerable settings, as populations and business actors would likely relocate, yet practical experience indicates that population groups, including teams, do not move in "fear." Practical experience also suggests that fans are especially resilient when attending games, as they are uniquely willing to tolerate risk "for the love of the game." In some settings, leagues also possess legal incentives to refrain from franchise relocation efforts.

On the other hand, when contemplating the specific plight of the Saints and Hornets in New Orleans, added dynamics of stigma, race, enigmatical ownership, and optimism bias collectively discourage their immediate return. Indeed, the unique qualities of a nightmarish Katrina and a recuperating New Orleans pose uncharted waters for

Weapons in the Fight Against Professional Sports Franchise Relocation, 75 U. COLO. L. REV. 1065, 1074 (2004).

92. See generally Matthew J. Minton & Bruce W. Barton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 69-70 (1997); but see Lisa-Michele Smith, *History, Rivalry, Envy, and Relocation: Will the Sale of the New York Jets Give Rise to a New Stadium?*, 7 SPORTS L. J. 309, n. 175 (noting that even if a city were to negotiate a long-term lease with a franchise, the team owner can usually break the lease and pay damages for breach of contract, as injunctions are unlikely).

93. See *Statement of Paul Tagliabue, Commissioner of the National Football League*, before the House Committee on Commerce, May 16, 1996, available at Lexis/Nexis News Wire; see also Nottingham, *supra* note 85, at 1079 (describing effect of threat of litigation on NFL Commissioner Paul Tagliabue in league decision to allow Rams to move from Los Angeles to St. Louis in 1995; Marc Topkin, *Seattle Side Fires Back at Baseball*, ST. PETERSBURG TIMES, May 28, 1992, at 1C (noting how Major League Baseball were concerned with threat of litigation by the city of Seattle should it have attempted to relocate Seattle Mariners to St. Petersburg).

94. The Saints' principal owner, Tom Benson, negotiated the right to opt out of his contract (which runs through 2010) to play in the publicly-financed Superdome, provided he make an \$81 million payment to the state of Louisiana. See Ferrell, *supra* note 65.

leagues, teams, and players. Nevertheless, for reasons described above, a hasty return may only precipitate a permanent relocation.

III. TERRORISM AND PROFESSIONAL SPORTS

Since the attack on the World Trade Center and Pentagon on September 11, 2001, terrorism and the law has become a popular and essential topic in legal scholarship.⁹⁵ Legal scholars have debated the appropriate balance between security and liberty, and this topic will remain at the forefront of scholarship for years to come. Naturally, it has also attracted the interest of elected officials and policy-makers who seek to prevent future attacks while simultaneously preserving core democratic values.

Professional sports actors have also been deeply affected by terrorism and the fear of future attacks. The concern is multi-fold. Perhaps most obviously, a terrorist attack at a major sporting event could cause tens of thousands of casualties. Just consider how a terrorist attack during Super Bowl XL could have endangered the lives of over 65,000 persons,⁹⁶ or how one during Super Bowl XIV could have done the same to over 103,000 persons.⁹⁷ Aside from immediate deaths, local hospitals would likely struggle to treat tens of thousands of suddenly wounded persons, and even those unharmed by the attack could be kill or injured while frantically fleeing the stadium.⁹⁸

Likewise troubling, major sporting events are considered "soft targets" or those particularly vulnerable and difficult-to-secure. Indeed, sporting events tend to feature large numbers of persons constantly entering and exiting a confined facility, as well as significant

95. On April 30, 2006, a search of "terrorism" and "law" among titles of law review publications on Lexis/Nexis published from September 11, 2001 to April 30, 2006 yielded 197 results.

96. See *Super Bowl Information*, SUPER BOWL.COM (Official Website of Super Bowl XL), at http://www.superbowl.com/features/general_info (last visited Aug. 26, 2006).

97. See *Highest Attendance at a Super Bowl*, GUINNESS BOOK OF WORLD RECORDS, available at http://www.guinnessworldrecords.com/content_pages/record.asp?recordid=45816 (last visited Aug. 26, 2006).

98. See Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 777 (2003) (describing effect of terrorist attack on heavily populated areas, such as sporting events, parades, or major tourist attractions); see also B. Tilman Jolly & Ricardo Martinez, *Heart-stopping Action: Whether it's A Sporting Event or A Rock Concert, Medical Emergencies can Spoil the Fun and Create Liability Unless Management Plans Ahead*, 4 SECURITY MANAGEMENT 94 (2004) (describing how a state of panic would exacerbate harm following a terrorist attack on a major sporting event).

and often congested movement of persons within that facility.⁹⁹ Less obviously, patrons of sporting events tend to be highly-focused on the game rather than on their surroundings, and are thus less likely to detect wrongdoing and nefariousness than in other settings.¹⁰⁰ Stadium security personnel are also disadvantaged by the situational pressure of impatient fans seeking to enter the stadium, as well as by the practical necessity of preventing long and slow-moving entrance lines.¹⁰¹ According to some experts, stadium security personnel seldom possess sufficient anti-terrorist training,¹⁰² and are thus especially vulnerable to the “situation” of large numbers of fans anxiously waiting to enter the stadium. In other words, sporting events typically entail tens of thousands of distracted persons moving in and around difficult to secure areas that are protected by questionably-trained personnel.

Consider also the symbolic value of sporting events: they represent a core component of “Americana” and embody shared emotional capital. However quixotically, Americans tend to view sports as emblematic of a culture of perceived merit and hard work, and how dispositional qualities are thought to determine level of achievement.¹⁰³ An attack on a major sporting event may thus inflict a deep wound upon our national psyche, as well as unhinge the psychological underpinnings that are thought to separate “us” from the rest of the world.

Financial considerations are also salient. An attack on a major sporting event could impose massive tort liability on the sponsoring league, the hosting team, and stadium operators for inadequate secu-

99. See Caitlin M. Piccarello, *Terrorism, Tourism, and Torts: Liability in the Event of a Terrorist Attack on a Sports or Entertainment Venue*, 12 VILL. SPORTS & ENT. L.J. 365, 366-67 (2005).

100. See generally DANIEL L. WANN, *THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS* (2000).

101. See Angelo Bruscas, *Extra Security Hounding Sports Fans Everywhere*, SEATTLE POST-INTELLIGENCER, Mar. 26, 2003, at E1 (discussing situational pressures on stadium security personnel).

102. See generally Benjamin D. Goss et al., *Primary Principles of Post-9/11 Stadium Security in the United States: Transatlantic Implications from British Practices*, available at <http://www.iaam.org/CVMS/Post%20911%20Stadium%20Security.doc> (last visited Aug. 26, 2006).

103. This topic is one of great debate, and I am currently co-authoring a piece on it. For an interesting discussion of sports and social movements, see generally Donald T. Meir, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout From the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 145 (2002).

rity.¹⁰⁴ Perhaps not surprisingly, the cost of property and liability insurance for professional sports teams and related actors has skyrocketed in recent years.¹⁰⁵

Lastly, consider the *actuality* of a terrorist strike on a game. In October 2005, a 21-year-old engineering student detonated a bomb 100 yards from the University of Oklahoma Memorial football stadium which was filled with 84,000 fans.¹⁰⁶ The bomber died instantly, and none of the fans were hurt. However, a bus driver was injured by the blast, which "was so powerful that people up to four miles away reported hearing it and windows in [a building] 100 yards away shattered."¹⁰⁷ Of perhaps equal worry, un-detonated explosive devices were found nearby.¹⁰⁸ University of Oklahoma and government officials downplayed the incident as an isolated event and the product of an emotionally disturbed student,¹⁰⁹ yet others have characterized it as possible domestic terrorism and indicative of the vulnerability of sporting events.¹¹⁰

In light of this multi-tiered concern, it is unsurprising that leagues are now intently focused on event security. Consider the

104. See Piccarello, *supra* note 93, at III; see generally Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KENTUCKY L. J. (forthcoming, 2006) (exploring economic implications of terrorism on assorted economic actors).

105. See e.g., Barnet D. Wolf, *Paying a Price for Security*, COLUMBUS DISPATCH, May 25, 2002, at 1C (noting that at Miller Park, home of Major League Baseball's Brewers, the cost of property and liability insurance, which covers terrorism, skyrocketed from \$255,000 in 2001 to \$2.3 million in 2002).

106. See Cinnamon Stillwell, *Terrorism Strikes the Homeland*, ACCURACY IN MEDIA, Oct. 7, 2005, at http://www.aim.org/guest_column/4077_0_6_0_C/; see also Joel Mowbray, *Florida Judge Shockingly Halts Security Searches at Games*, TOWN HALL, Oct. 31, 2005, at <http://www.townhall.com/opinion/columns/joelmowbray/2005/10/31/173449.html> (noting distance between bomb and stadium).

107. *Id.*

108. *Id.* (citing remarks by Douglas Hagmann, Director of the Northeast Intelligence Network).

109. *Id.*; see also *Motives Sought for Oklahoma Suicide Bombing*, FOX NEWS TRANSCRIPTS (HANNITY AND COLMES), Oct. 14, 2005, available at Lexis/Nexis News Wire (quoting U.S. Rep. Tom Cole (R-OK): "[E]verything so far appears to indicate this was indeed an isolated incident, a very lonely and troubled young man who had had a rather disturbed adolescence and early adulthood. And frankly resulted in suicide. We don't find any evidence at all of a terrorist activity or any plots, not in the Islamic community.").

110. See e.g., *Motives Sought for Oklahoma Suicide Bombing*, *supra* note 103 (quoting Fox News commentator Sean Hannity: He had a Pakistani roommate . . . Well, Congressman, he blew himself -- he blew himself up 100 yards away from a football stadium packed with 85,000 people. It is beyond rare, the person that commits suicide with a bomb . . . Should it not raise suspicion and concern?")

NFL. According to Milton Ahlerich, the NFL's Vice President of Security, "event security immediately became, through pronouncement by our commissioner, the *number one priority* of the National Football League" after 9/11.¹¹¹ In fact, NFL officials conclude that the league may cease as a viable economic entity should a terrorist attack occur at a game and cause significant casualties.¹¹² Put more bluntly, the NFL, like similarly situated actors, likely "enjoys" a 0 margin of error in preventing a terrorist attack on a game.

In response to such a daunting challenge, the NFL has implemented a bevy of new security measures for games. These measures include increased numbers of security personnel at all points in the stadium, enhanced computer surveillance equipment, and stricter prohibitions on items allowed into the stadium.¹¹³ Collectively, these measures are thought to promote deterrence, diminish opportunities for terrorist strikes, and diminish tort liability in the event of an attack.¹¹⁴

More controversially, new NFL security measures also include "pat-downs" of patrons before they enter the stadium. Pat-downs entail the touching or patting of the outer garments,¹¹⁵ and are usually performed above the waist.¹¹⁶ Pat-downs below the waist are less common, although may occur if security personnel observe suspicious bulges in the pocket areas.¹¹⁷ Patrons found to be carrying suspicious materials are detained while the police are summoned.¹¹⁸ Patrons who refuse the pat-downs are denied entrance.¹¹⁹ Pat-downs became official NFL policy in August 2005 when the league declared that "all persons attending league games must be physically searched before entering any of the venues where the games are played" with "the aim being to prevent terrorists from carrying explosives into the stadi-

111. See *Legal Issues in Sports Security*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 349, 351-52 (2003) (emphasis added).

112. *Id.* at 352.

113. See Jared Wade, *Safeguarding the Meadowlands*, RISK MGMT., Dec. 2002, at 20.

114. See *Legal Issues in Sports Security*, *supra* note 105, at 357 (citing remarks by William Squires, Director of Operations, New Stadium Meadowlands); see generally Piccarello, *supra* note 93 (describing role of tort liability in assessing ant-terrorist efforts by professional sports teams).

115. *Id.* at 355.

116. *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1078.

117. *Id.*

118. *Id.*

119. See *Legal Issues in Sports Security*, *supra* note 105, at 357 (citing remarks by William Squires, Director of Operations, New Stadium Meadowlands).

ums."¹²⁰

The stated intent of pat-downs is based on long-standing international use of pat-downs by security officials. Israeli security and military personnel, for instance, routinely use them because suicide vests may be obscured underneath terrorists' clothing.¹²¹ Others posit that pat-downs are more likely to deter an attempted terrorist attack than to intercede in one, since terrorists can still conceal material below the waist or otherwise bypass questionably-trained security.¹²² Unlike the NFL, the NBA, Major League Baseball ("MLB"), and the National Hockey League ("NHL") have not instituted stadium security policies that require pat-downs.¹²³

The use of pat-downs for NFL games has drawn fan protest and, more recently, legal scrutiny. In *Johnston v. Tampa Sports Authority*,¹²⁴ a Florida court issued a preliminary injunction prohibiting officials at Raymond James Stadium—home of the Tampa Bay Buccaneers—from "mass suspicionless pat-downs" of persons entering the stadium.¹²⁵ The court reasoned that pat-downs violate the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the Florida Constitution, both of which prohibit "unreasonable" searches and seizures.¹²⁶ Significantly, and unlike security management operations found at some NFL stadiums, the Tampa Sports Authority is a public entity for the purpose of planning and maintaining sports facilities and is thus subject to constitutional scrutiny as a state actor.¹²⁷ In granting the restraining order, Judge Perry A. Little concluded that

120. *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076.

121. See Mowbray, *supra* note 100.

122. See Billy Witz, *NFL's Tricks and Treats: 49ers are Just Horsing Around*, DAILY NEWS OF LOS ANGELES, Oct. 30, 2005, at S7; see also Sally Kalson, *What will we Endure for the Sake of Security?*, PITTSBURGH POST-GAZETTE, Aug. 17, 2005, at A2 (citing remarks by Barb Feige, director of the American Civil Liberties Union Pittsburgh office). The NBA, however, encourages the use of pat-downs, along with other security measures. See Ray Waddell, *Safety, Security Top Priority Among Arenas*, BILLBOARD, Aug. 9, 2003, at 43.

123. See e.g., Kalson, *supra* note 116 (citing remarks by Pittsburgh Pirates spokeswoman Patty Paytas that Major League Baseball does not authorize pat-downs).

124. Case No. 05-09151 (13th Jud. Court, Fla. Civil Division, Nov. 2, 2005), available at http://www.acluf.org/issues/national_security/Pat-DownPrelimInjunction.pdf; affirmed, *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076 (Fla. App. 2005).

125. *Johnston v. Tampa Sports Authority*, 2005 U.S. Dist. LEXIS 40046 (M.D. Fla., Dec. 23, 2005).

126. 914 So. 2d at 1078-79.

127. See Case No. 05-09151 (Judge Little writing, "the TSA performs the pat-down searches as a state actor . . . [it] is a public agency"); see generally *Website for Tampa Sports Authority*, <http://www.tampasportsauthority.com/> (last visited Aug. 26, 2006).

protection against unreasonable searches outweighed any security benefit, that patrons lacked a legal remedy for any harm caused by the pat-down, and that the plaintiff was likely to succeed in his trial.¹²⁸ Equally significant, the NFL failed to supply evidence demonstrating that pat-downs actually work. In fact, the NFL has never tested their effectiveness or compiled data revealing the frequency of patrons detained and later arrested.¹²⁹ One media report even asserts that pat-downs in NFL games have not led to the discovery of a single item of contraband, let alone terrorist material.¹³⁰

Despite *Johnston*, the NFL preserved its pat-down policy in other stadiums for the remainder of the 2005 NFL season. Indeed, the state court decision was only binding upon the Tampa Bay Authority, and thus limited in application to home games played by the Tampa Bay Buccaneers. Nevertheless, *Johnston* may have a lasting effect on Buccaneers' home games, as in July 2006, Judge James D. Whittemore of the U.S. District Court for the Middle District of Florida refused to lift the the state court's injunction.¹³¹ While acknowledging that "after September 11, 2001, Americans are justifiably more sensitive to the need to protect against acts of terrorism," Judge Whittemore concluded that "a generalized fear of terrorism should not diminish the fundamental Fourth Amendment protections envisioned by our Founding Fathers. Our Constitution requires more."¹³²

The plaintiff's success in *Johnston* could trigger similar claims across the country. One has already emerged. In December 2005, two San Francisco 49ers season ticket-holders filed a lawsuit in San Francisco Superior Court alleging that the NFL pat-down policy at 49ers games violated their right to privacy under the California Constitution.¹³³ As of this writing, *Sheehan v. San Francisco 49ers* remains in litigation.

128. See *Johnston v. Tampa Sports Authority*, Case No. 05-09151 (13th Jud. Court, Fla. Civil Division, Nov. 2, 2005), available at http://www.aclufl.org/issues/national_security/Pat-DownPrelimInjunction.pdf.

129. See Candace Rondeaux, *Patdowns Halted—For Now*, ST. PETERSBURG TIMES, Oct. 28, 2005, at 1B (citing remarks by Robert Hast, NFL director of event security).

130. See Daniel Ruth, *Macarena Provides More Fan Security*, TAMPA TRIB., Oct. 10, 2005, at 2.

131. *Johnston v. Tampa Sports Authority*, 2006 U.S. Dist. LEXIS 52173 (M.D. Fla., July 28, 2006); see also Thomas W. Krause, *Pat-Down Case Stays in Federal Dominion*, TAMPA TRIB., Dec. 24, 2005, at 6 (supplying background information on the federal appeal).

132. *Id.* at 44.

133. See Cicero A. Estrella, *NFL's Pat-Down Policy Challenged*, SAN. FRAN. CHRON., Dec. 15, 2005, at B1.

Johnston and *Sheehan* have sparked spirited debate as to the appropriate balance between “security” and “freedom” at NFL games. Those opposed to pat-downs have queried why the NFL, unlike other pro sports leagues, would utilize them and “whether the NFL trusts its fans less than Major League Baseball or NASCAR, or is just more paranoid.”¹³⁴ Other critics posit that pat-downs, as conducted by sometimes less than engaged, less than well-trained security personnel, prove “jokingly” ineffective¹³⁵ and merely manifest a “feel-good” measure that deludes fans into overestimating the NFL’s concern for their safety.¹³⁶ Additional critiques contend that pat-downs may cause public humiliation,¹³⁷ and by requiring a group of people to wait in line, might unwittingly spawn a terrorist target outside of the stadium.¹³⁸

Critics of pat-downs also highlight judicial resistance to their use in similar and arguably analogous settings. For instance, in *State v. Seglen*,¹³⁹ the Supreme Court of North Dakota ruled that a pat-down policy at University of North Dakota hockey games violated the Fourth Amendment.¹⁴⁰ The court reasoned that pat-downs are inherently intrusive, and their use in airports and courthouses reflects a narrow exception to their general disfavor.¹⁴¹ Courts addressing pat-downs in other entertainment contexts have ruled similarly. For instance, both the Supreme Court of Washington and the U.S. District Court for the Southern District of Texas have ruled that pat-downs of

134. See Charles Kling, *Letters to the Editor*, ST. PETERSBURG TIMES, Sept. 18, 2005, at 2P.

135. See Greg Reeves, *Welcome to Arrowhead: Spread 'em!*, K.C. BLOGS, Sept. 13, 2005, at http://blogs.kansascity.com/crime_scene/2005/09/welcome_to_arro.html (citing comments from Kansas City Chiefs’ fan “Michelle”).

136. See Chris Graham, *At What Price Security?*, AUGUSTA FREE PRESS, Feb. 20, 2006, at [http://www.augustafreepress.com/stories/storyReader\\$39039](http://www.augustafreepress.com/stories/storyReader$39039) (citing remarks by security-technology expert Bruce Schneier); see also David Whitley, *NFL Too Cheap When it Comes to Fans’ Safety*, ORLANDO SENTINEL, Sept. 9, 2005, at D1 (contending that pat-downs are “designed to make people feel better without addressing the actual problem,” particularly given the apparent indifference of those entrusted to pat-down).

137. See *Airport Security*, ABOUT.COM, available at <http://terrorism.about.com/od/protectingtargets/i/airportsecurity.htm> (last visited Aug. 26, 2006).

138. See Graham, *supra* note 129 (citing comments by Rebecca Steele, director of the ACLU of Florida’s Tampa office).

139. 700 N.W.2d 702 (N.D. 2005)

140. *Id.* at 708-09; see also Greg Skidmore, *Pat Downs at Sports Arenas: Necessary Precaution or Unconstitutional Search?*, SPORTS LAW BLOG, Oct. 26, 2005, at <http://sports-law.blogspot.com/2005/10/pat-downs-at-sports-arenas-necessary.html>.

141. *Id.* at 708.

rock concert patrons violate the Fourth Amendment.¹⁴² Both courts enunciated that pat-downs are appropriate only in exceptional circumstances, such as in ensuring the safety of airports and courts, which, in some instances, could have used pat-downs to prevent specific acts of violence.¹⁴³

Predictably, supporters of the NFL pat-down policy strike a different chord. Most obviously, they believe that pat-downs can prevent or deter catastrophic terrorist strikes, and that the inconvenience of a 3-to-5 second pat-down is therefore eminently tolerable.¹⁴⁴ A correlative benefit appears to be the “peace of mind” that some patrons internalize upon knowing that other patrons have been patted down.¹⁴⁵ The indiscriminate nature of the pat-downs has also been mentioned as a positive. Perhaps surprisingly, an official at the American Civil Liberties Union—an organization that has sponsored the plaintiffs in *Johnston* and *Sheehan*—observed this particular benefit. Barb Feige, director of the American Civil Liberties Union Pittsburgh office, reasoned “from a civil liberties standpoint, [patting-down] is not an issue as long as they’re doing it to everyone.”¹⁴⁶ Indeed, unlike random searches in public settings, pat-downs are imposed upon all patrons and occur at games that are voluntarily attended and that obviously comprise “unnecessary” activities. Most of these same patrons also seem content with pat-downs: NFL attendance rose in the 2005 season.¹⁴⁷

On balance, pat-downs at NFL games provide uncertain benefit, and most fans do not appear troubled by either the pat-down or the delay in entering the stadium, perhaps because they view their game attendance as an optional life activity. Speculatively, a social-psychologist might posit another explanation: NFL fans may be evincing “duration neglect,” or the tendency to undervalue or disregard the duration of an experience when evaluating its unpleasantness

142. See generally *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (Wash. 1983); *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976).

143. 658 P.2d at 655; 414 F. Supp. at 1362. Indeed, consider that pat-downs of the 9/11 hijackers may have uncovered their box-cutters.

144. See Mowbray, *supra* note 100; see also Reeves, *supra* note 128 (citing remarks by Vicky Heston).

145. See Tom Perry, *Pat-downs Help Fans Focus on Football*, GREEN BAY PRESS-GAZETTE, Sept. 21, 2002, at 1B.

146. See Kalson, *supra* note 116.

147. See *Heads Up: What We're Talking About this Week*, SEATTLE-POST INTELLIGENCER, Jan. 9, 2006, at C2.

or deciding among future experiences.¹⁴⁸ Interestingly, individuals tend to prefer experiences with adverse, yet static effects over experiences of the same duration with preferable, yet worsening effects.¹⁴⁹ To illustrate, in an experiment conducted by Professors Charles A. Schreiber and Daniel Kahneman, respondents were asked to rank two circumstances: 20 seconds of a displeasing drilling noise that maintained a constant intensity of 75 decibels, or 20 seconds of the same noise that gradually increased in intensity from 0 decibels to 75 decibels.¹⁵⁰ Although the former choice would appear to be “worse”—the drilling remains at the highest decibel throughout—most respondents regarded it as preferable.¹⁵¹

Along those lines, perhaps fans prefer to wait in long lines for an uncomfortable, yet certain pat-down over waiting in a faster-moving line that or may not yield a pat-down. One stadium expert corroborates this deduction.¹⁵² If verifiable in the aggregate, such a phenomenon would suggest that leagues and teams might enjoy greater autonomy with universally applied security measures than with those applied discriminately.¹⁵³ Considering the prospective reduction in tort liability supplied by stringent security measures, enhanced autonomy may emerge as economically beneficial.

Leagues, teams, and fans are not the only sports actors affected by increased attention to terrorism. Based on their commentary, professional athletes are also worried by it. Unsurprisingly, their concerns were most detectable in the immediate aftermath of the September 11, 2001 terrorist attacks.¹⁵⁴ Perhaps more interesting, my research identified only one player who has enunciated either a pref-

148. See Clinton T. Christensen, *Memory and Choice (Thesis)*, at 1, available at <http://dscholarship.lib.fsu.edu/cgi/viewcontent.cgi?article=1130&context=undergrad> (last visited, Aug. 26, 2006).

149. *Id.*

150. See Charles A. Schreiber & Daniel Kahneman, *Determinants of the Remembered Utility of Aversive*, 129 J. EXPERIMENTAL PSYCH., 27-42 (2000).

151. *Id.*

152. See Kelly Ettenborough et al, *Fans Unfazed by Security Despite Increased Efforts*, ARIZONA REPUBLIC, Mar. 4, 2002, at 1B (citing remarks by Bill Terrance, a supervisor with MVP Events, an event management and security company in Scottsdale, Arizona).

153. Empirical research is obviously needed to validate such a deduction.

154. See e.g., Tom Timmerman, *Security at Sports Venues Gets More Scrutiny*, ST. LOUIS DISPATCH, Sept. 15, 2001, at 5 (citing concerns by St. Louis Rams player Ernie Conwell about players' vulnerability to a terrorist attack at a stadium); John Henderson, *Even as Professionals, Baseball Players Share Emotional Turmoil*, DENVER POST, Sept. 23, 2001, at C06 (citing remarks by players on the Colorado Rockies and Arizona Diamondbacks about how they were emotionally affected by the 9/11 attacks).

erence for playing in a presumptively safe locale or an aversion to playing in a locale considered more vulnerable to a terrorist attack.¹⁵⁵ In other words, players do not seem to feel, or at least acknowledge a concern that, for instance, playing for teams in New York City or Washington D.C.—arguably the two American cities most vulnerable to a terrorist attack¹⁵⁶—may prove less safe for themselves and their families. This viewpoint contrasts with the views of many Americans, who, because of terrorism, consistently express trepidation about living in New York City or Washington D.C.¹⁵⁷ (even though, as reflected in rising and often astronomical housing costs, both cities remain coveted places to live).¹⁵⁸

The reticence of players to acknowledge “safety concerns” may

155. In explaining her decision to play for a team in Ramat Gan, Israel, rather than returning to play in New York City, professional basketball player Simone Edwards stated, “I’m more scared of being in New York than being in Israel.” See Jayda Evans, *Basketball in Israel: Storm Players Soak it Up Tomorrow*, SEATTLE TIMES, May 28, 2002, at D1.

156. See Daniel Hays, *Will TRIA Extension Vote go to the Wire?*, PROPERTY & RISK, Sept. 20, 2004 (citing expert opinion that New York and Washington D.C. are considered more likely to be attacked than other American cities, and that is reflected in higher insurance rates for property in those two locations); Mark Leibovich & Roxanne Roberts, *Ready or Not? A Capital Question*, WASH. POST, Feb. 12, 2003, at C01 (citing government officials who claim that New York and Washington D.C. are considered more likely targets than other American cities); but see *Danger Lurks Within America’s Borders*, INDIANAPOLIS STAR, Sept. 12, 2005, at 8A (Editorial) (claiming that “[a]uthorities say domestic terrorists are more likely to target a Midwestern city than New York or Washington”).

157. See e.g., *New York Times/CBS News Poll*, N.Y. TIMES.COM, Aug. 8, 2002—Aug. 25, 2002, available at http://www.nytimes.com/packages/html/nyregion/20020911_POLL/020911poll-results.html (Question 9 citing feelings among New Yorkers that they believe New York is more likely to be a terrorist target than other American cities); *CBS News/New York Times Poll: New York City: Nine Months Later*, CBS NEWS.COM, June 10, 2002, at <http://www.cbsnews.com/stories/2002/06/10/opinion/polls/main511729.shtml> (citing various poll data demonstrating fear of terrorists striking New York City again); *A Tale of Two Cities*, ECONOMIST, Sept. 12, 2002, available at http://www.economist.com/printedition/displayStory.cfm?Story_ID=1328844 (citing a decline in percent of New Yorkers who want to continue to reside in New York City); Jose Martinez & Tracy Connor, *Confusion over Alert for Apartments*, DAILY NEWS, May 22, 2002, at 4 (citing comments from Manhattan resident Paul Hoppe: “Living in New York, you know there’s a certain risk involved. You just sort of learn to accept that”); Anne Neville, *Aftershock*, BUFFALO NEWS, Sept. 11, 2002, at D1 (citing remarks from person who moved away from D.C. because of the stress of living and working in D.C. pertaining to worry about a terrorist attack).

158. As of October 2005, Manhattan was the most expensive city to live in the United States, with Washington D.C. the fifth most expensive. See Les Christie, *Priciest U.S. Cities*, CNN MONEY, Oct. 25, 2005, at http://money.cnn.tv/2005/10/18/real_estate/buying-selling/most_expensive_places/index.htm; see also Patrice Hill, *Region Joins Housing Bubble*, WASH. TIMES, Feb. 14, 2005, at A01 (noting that Washington area home prices surged 24 percent from 2003 to 2004, twice the national rate and the fourth straight year of double-digit gains, and that since the late 1990s, home prices have doubled in northern Virginia and many other parts of the Washington area).

reflect assorted phenomena. Most apparently, some players may simply not harbor fears about playing for teams in New York City or Washington D.C. Such a deduction would not be irrational, as terrorists could obviously strike any locale, and recent security observations suggest that the threat to “unsuspecting” locales is far greater than is commonly presumed.¹⁵⁹ In fact, in justifying the dispersed funding provisions of the *Homeland Security Fiscal Year 2006 Funding Bill*, U.S. Rep. Mark E. Souder, a senior member of the Homeland Security Committee, reasoned “terrorists could strike anywhere—not just in New York or Washington.”¹⁶⁰ As a result, a player may simply perceive a risk playing anywhere, and since it is impossible to know which city the terrorists are targeting, a player may be indifferent towards the risk of terrorism relative to locale.

Then again, since many in the general population believe that New York and Washington D.C. are relatively “risky” places, it stands to reason that a similar proportion of players should feel similarly; there is no evidence to suggest that players are somehow uniquely enlightened or more informed about the risk of terrorism.¹⁶¹ Suggestively then, some players may be withholding their actual feelings about the risk of terrorism. Such reticence may be explained by assorted hypotheses.

For instance, gender roles may be pertinent: some male athletes may be genuinely worried about security, but admitting as much might conflict with social expectations for traits commonly attributable to male athletes, such as “tough” or “macho.” Put more bluntly, athletes may fear “looking like a wimp” should they even hint at “being afraid.”

Sociological findings appear to substantiate this deduction. As explained by sociologist Bruce Kidd, the “range of masculinities in sports . . . is subordinated in public discourse and institutional expect-

159. See e.g., David E. Sanger, *Antiterrorism Officials Reveals New Details*, N.Y. TIMES, Oct. 8, 2005, at A11 (noting that purported terrorist attack of Los Angeles was part of a “larger plan” on September 11, 2001 to attack both coasts, and not solely New York and Washington D.C.).

160. See *Homeland Security FY 2006 Funding Bill Passed by House*, US FEDERAL NEWS, May 17, 2005, available at Westlaw All News. This practice of dispersed funding has drawn criticism for providing rural, less-populated areas with a “disproportionate amount of money.” See e.g., Veronique de Rugy, *Are We Ready for the Next 9/11?*, 37 REASON 24 (stating, “[t]he theory underlying the grant distribution formula is that terrorists could strike anywhere. That’s true. But not every target is equally likely or equally important. By trying to protect us everywhere, Congress ensures that we’re adequately protected almost nowhere.”).

161. See generally McCann, *It’s Not About the Money*, *supra* note 39.

tation to a single dominant or hegemonic masculinity, which is highly competitive, technological, and homophobic.”¹⁶² Similarly, empirical research finds that sports tend to socialize males at a young age to adapt certain characteristics, such as “competition, toughness, and winning at all costs, which are culturally valued aspects of masculinity.”¹⁶³ More broadly, American society tends to champion males who exhibit “strength” while attributing less social status to males engaged in introspective or unassuming behavior.¹⁶⁴

Intriguingly, however, when assessing opportunities to play in *foreign* locales, American professional athletes—both male and female—regularly express worry about terrorism. Their pattern of renegeing on commitments to play abroad perhaps best evidences this point. For instance, since 9/11, a group of professional female basketball players have backed out of contracts to play pro basketball in Europe,¹⁶⁵ while one Major League Baseball player—Kevin Millar—cited concerns about terrorism and a looming war in Iraq when renegeing on a contract to play in Japan.¹⁶⁶ NFL player Bill Ferrario conveyed similar reasons when opting out of playing in NFL Europe.¹⁶⁷ Consonantly, NBA players Richard Hamilton and Ben Wallace declined opportunities to play for the 2004 U.S. Men’s Olympic Basketball Team in Athens in part because of “safety concerns.”¹⁶⁸ Others have responded to more direct and obvious stimuli.

162. See Bruce Kidd, *The Men’s Cultural Centre: Sports and the Dynamic of Women’s Oppression/Men’s Repression* in MICHAEL A. MESSNER & DONALD F. SABO, *SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES* 31 (1990).

163. See Michael A. Messner, *Masculinities and Athletic Careers: Bonding and Status Differences* in MESSNER & SABO, *supra* note 155, at 97 (citing J. Lever, *Sex Differences in the Games Children Play*, 23 *SOCIAL PROBLEMS* 478 (1976) & W.E. Schafer, *Sport and Male Sex Role Socialization*, 4 *SPORT SOCIOLOGY BULL.* 47 (1975)).

164. See Julie Yuki Ralston, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members*, 16 *L. & INEQ. J.* 661, 665-66 (1998); Amy H. Kastely, *Out of Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 *U. CIN. L. REV.* 269, 300 (1994) (describing negative legal treatment of men who are deemed “too weak in understanding or in will power”).

165. See Omar Kelly, *Terrorism Quelled Some Interest in Overseas Leagues*, *SUN-SENTINEL*, May 6, 2002, at 10C.

166. See David Dorsey, *Security Expert Has Discussion with Twins*, *NEWS-PRESS*, Mar. 20, 2003, at 1C. It should be noted that Millar’s stated reason may have been pre-textual, as an opportunity to play for the Boston Red Sox occurred after he signed the contract to play in Japan, but before he reported to his Japanese team.

167. See Rob Demovsky, *War Kept Ferrario at Home*, *CAPITAL TIMES*, Apr. 14, 2003, at 2D.

168. See Brad Townsend, *Athens 2004*, *DALLAS MORNING NEWS*, Aug. 8, 2004, at 8;

For instance, while playing professional basketball in Turkey, Lindsey Yamasaki articulated a desire to leave the country immediately following a nearby terrorist attack.¹⁶⁹

The willingness of athletes to express fear of terrorism in foreign but not domestic locales may reflect various possibilities. This behavior may, for instance, embody informed deliberation: a number of European countries have suffered repeated terrorist attacks, and the Olympics have traditionally been considered a coveted target of terrorists.¹⁷⁰ Put differently, American athletes may justifiably regard those venues as more dangerous than venues found in the United States and thus male athletes exhibiting "fear" toward them may appear less dissonant with the male athlete archetype. The recognition that many athletes have young families only strengthens the presumed rationality of avoiding foreign and presumptively more dangerous locales.

This juxtaposition of willingness may perhaps also reflect normative pressures for group conformity, with "group" in this instance embodying the American citizenry and its nationalistic ideals. In this post 9/11 era, patriotism and patriotic expression have constrained the boundaries of individualism, thus compelling greater ascription to group norms.¹⁷¹ Among these norms is one which dictates, in sum and substance, "*we can't live in fear or the terrorists have won*"¹⁷²

see also Lacy J. Banks, *Don't Count on a Dream Team in Athens*, CHI. SUN-TIMES, May 16, 2004, at 101 (citing possibly concerns by NBA players and expressly-stated concerns by NBA officials and owners and about NBA players partaking in the 2004 Olympics); Mike Lucas, *Penney Hopes for Longer Spell in NBA*, CAPITAL TIMES, June 4, 2004, at 1D (citing remarks by New Zealand Basketball player Kirk Penney and his concern for safety in playing in the 2004 Olympic).

169. See Jerry Ulmer, *Yamasaki's 'Normal' Summer is Anything but Normal for Her*, OREGONIAN, July 15, 2004, at 7. Yamasaki was playing in Adana, while the terrorist attack occurred in Istanbul. *Id.*

170. See Joanne Wright, *Incidents Involving Terrorist Attacks (Pan-Europe)*, CHARLES DARWIN UNIVERSITY SYMPOSIUM SERIES, at <http://www.cdu.edu.au/cdss2003/papers/Sym3Papers/Appendix1-joannewright.pdf> (detailing terrorist attacks and attempted terrorist attacks in Europe from 2001 to 2003); Jared Wade, *Ready or Not, Olympic Terrorism*, RISK MANAGEMENT, Aug. 1, 2004, at 12 (supplying background on terrorism and the Olympics); see also Hans de Vreij, *At least 15 foiled terrorist attacks in Europe since 9/11*, RADIO NETHERLANDS, Feb. 18, 2005, at <http://www.radionetherlands.nl/currentaffairs/region/westerneurope/ter050218> (noting how European authorities have thwarted 15 "mass casualty attacks" in Europe since September 11, 2001).

171. See Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL OF RTS. J. 367, 373 (2004).

172. See e.g., Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 564 (2004); see also

(which we will call the “fear aversion norm”). This norm has encouraged citizens to maintain their pre-9/11 routines and daily activities, such as opening mail,¹⁷³ flying on airplanes,¹⁷⁴ and riding on subways.¹⁷⁵ For professional athletes, perhaps the fear aversion norm further dissuades them from acknowledging apprehension of terrorists. Indeed, social psychologists find that the more an individual conforms to perceived norms, the more likely he will be considered estimable by members of his group.¹⁷⁶ In contrast, when an individual fails to adhere to norms, he runs the risk of social sanction or the withholding of certain social benefits.¹⁷⁷

Particularly given both the media spotlight on them and the nationalistic leanings of many sports fans,¹⁷⁸ professional athletes might be wary of violating the fear aversion norm, as doing so may inflict substantial harm on their reputation and earning capacity.¹⁷⁹ Even

Transcript from CNN The Point with Greta Van Susteren, CNN.COM, Dec. 4, 2001, available at <http://transcripts.cnn.com/TRANSCRIPTS/0112/04/tp.00.html> (quoting Los Angeles Mayor James Hahn: “we can’t let the terrorists win by giving up the freedoms that America provides for all of us. And if we crawl into a hole, then that will only help the terrorists think that they’ve really achieved a much greater victory than they have.”).

173. See e.g., Kathy Lauer-Williams, *Anthrax Fears Lessen at Post Office*, MORNING CALL, Oct. 16, 2002 (citing remarks by Mary Turner, resident of Bethlehem, Pennsylvania).

174. See e.g., Anne C. Mulkern, *Travel Agents Given a New Reason to Worry*, DENVER POST, Nov. 13, 2001, at A09 (citing remarks by Terry Boyd, resident of Denver, Colorado); David Westerfield, *Airline Woes Hit Home*, TIMES, July 6, 2003, at 11 (citing remarks by airplane pilot Jimmy Hudgens of Nashville, Tennessee).

175. See e.g., Dave Goldiner, *Fear, But “I Have to Work,”* DAILY NEWS, July 8, 2005, at 8 (citing remarks by Erin Shaffer, resident of Manhattan, New York).

176. See Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 ALA. L. REV. 1, 9 (2005) [hereinafter, Geisinger, *Are Norms Efficient?*]

177. See Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 3 (2001).

178. See *Importance of Sports in Political Campaigns*, NATIONAL PUBLIC RADIO (Day to Day program), Apr. 24, 2004, available at Lexis/Nexis News Wire (citing remarks by pollster John Zogby that sports fans vote like gun owners church goers, while people who don’t like sports “are less likely to attend a place of worship frequently, less likely to own a gun, more likely to have attended college or beyond, more likely to be a member of what some folks call the creative class.”); see also MICHAEL MANDELBAUM, *THE MEANING OF SPORTS* 128-143 (2004) (explaining that fans’ interest in football reflects both the human instinct for warfare and the common male fixation with military strategies); DANIEL L. WANN ET AL., *SPORT FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS* 185-86 (2000) (discussing Real’s study, which found that “professional football resonates strongly with American spectators because it elaborates upon society’s most elemental themes (e.g., heroic archetypes, material well-being, and corporate management), speaking to them in the terms of cultural myths that they clearly understand and embrace.” (citing Michael Real, *Super Bowl: Mythic Spectacle*, 25 J. COMM. 31-43 (1975))).

179. For instance, it is thought that the refusal of Carlos Delgado, a major league base-

those players inclined to disclose their apprehensiveness are affected by the tendency of individuals to transform their judgments to that of the group.¹⁸⁰ This behavioral manifestation reflects the normalizing of emotions during "social conformity," the process in which beliefs and positions are modified to comport with group surroundings.¹⁸¹

Cognitive errors may also help to explain the situational reticence of professional athletes. For instance, informational deficiencies and time constraints may encourage athletes, like most persons, to make inferences about the safety of foreign lands from small and unrepresentative sample sizes.¹⁸² Indeed, we might only observe foreign cities through media and other impersonal, perhaps hyperbolized channels. Moreover, the fundamental attribution error suggests that our observations—and corresponding attitudes, cognitions, emotions, and behaviors—are most affected by dramatic situational happenings.¹⁸³ For that reason, our attention to news tends to be most acute when the news is striking, such as with a terrorist attack or a natural disaster, meaning to the extent the media gravitates toward negative news, our impression of foreign lands may be tainted negatively.¹⁸⁴ As a result, terrorism abroad may *seem* worse than it actually is, and athletes may thus view opportunities to play abroad as less desirable than objective data would suggest.

Knowledge structures may only exacerbate cognitive errors pertaining to sample size. Knowledge structures are the "intuitive implements"¹⁸⁵ that facilitate social understandings and engender social

ball player, to stand during the singing of "God Bless America" negatively hurt his perception in baseball, and potentially harmed his endorsement opportunities. See Sam Borden, *A Man of Principle*, N.Y. DAILY NEWS, Jan. 23, 2005, at 72.

180. See Gregory S. Berns et. al., *Neurobiological Correlates of Social Conformity and Independence during Mental Rotation*, 58 BIOLOGICAL CHEMISTRY 245-53 (2005).

181. *Id.*

182. See generally Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 403 (2000) (discussing significance of small sample size in forming conclusions). Informational deficiencies have been documented in other settings. For instance, law enforcement officers regularly make conclusive judgments of guilt on the basis of only one or two witness interviews. See Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L., 765, 767 (1995).

183. See generally Hanson & Yosifon, *The Situational Character*, *supra* note 1.

184. See e.g., *Reliable Sources*, CNN TRANSCRIPTS, Oct. 30, 1994, available at Lexis/Nexis News Wire (quoting Professor Kathleen Hall Jamieson: "The press, which gravitates toward the negative . . .").

185. See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 18 (1980); see also Geisinger, *Are Norms Efficient?*, *supra* note 169, at 22 (discussing empirical evidence of editorial choices in news presentation

judgments.¹⁸⁶ Because the human mind cannot assess *every* piece of information encountered at *every* moment, knowledge structures allow it to behave as a "cognitive miser," thus directing attention to the most obvious stimuli available.¹⁸⁷ Constructively, knowledge structures enable us to interpret and classify the myriad stimuli (e.g., objects, experiences, ideas, people, and behavior) apparent at any moment;¹⁸⁸ without them, we would be unable to administer and take meaning from commonplace occurrences.¹⁸⁹

Furthermore, because they help the mind to interpret and classify stimuli, knowledge structures engender beliefs, theories, and schema.¹⁹⁰ Yet because they also simplify the world and trigger "mental short cuts," knowledge structures can, and frequently do, engender inaccurate belief systems. Most notably, knowledge structures frequently lead persons to develop mistaken beliefs about groups of persons, more typically described as "group stereotypes."¹⁹¹ Empirical research has confirmed the role of group stereotypes in how Americans tend to disparately regard the identical behavior of white and black persons,¹⁹² of high-socioeconomic and low-socioeconomic persons,¹⁹³ and, of particular relevance to this analysis, of domestic

as affecting public perception).

186. See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 430 (1999).

187. *Id.* at 23.

188. See Hanson & Yosifon, *The Situational Character*, *supra* note 1, at 50-51; see also Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 770 (2000) (describing interplay between knowledge structures and schemas, with schemas defined as "knowledge structures that are comprised of assumptions, expectations, and generic prior understandings").

189. See Kunda, *supra* note 179, at 17; see also David McGraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U.L. REV. 81, 101 (offering linguistic analysis of how knowledge structures provide meaning to words and symbols).

190. *Id.*

191. See Nisbett & Ross, *supra* note 178, at 35; see also Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Preemptory Challenge*, 85 B.U. L. REV. 155, 192-95 (2005) (describing role of knowledge structures in formation of racial stereotypes); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 749-50 (observing knowledge structures as a mode of explaining cognitive structures and racial beliefs).

192. See Hanson & Yosifon, *The Situational Character*, *supra* note 1, at 53, discussing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE*, at xiii (1954) (studying reaction to experimental interaction between two men, with men varying in role and race, and with one man pushing the other); see also Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U.L. REV. 1259, 1290 (discussing role of "unconscious racism" in how behavior is perceived).

193. *Id.* discussing John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL., 20, 25 (1983).

and foreign persons.¹⁹⁴

A group stereotype of foreign peoples is sometimes described as "xenophobia," or a fear of foreigners and their society.¹⁹⁵ Xenophobia has been detected in the setting of terrorism. For instance, following the 1995 Oklahoma City bombing, where 168 people were killed, most of the American public thought that Middle Eastern terrorists were responsible.¹⁹⁶ Alarmingly, and particularly for a democratic society, this default assumption "had the potential to intensify anti-immigrant, xenophobic, and isolationist tendencies."¹⁹⁷ In less dramatic instances that pertain to terrorism, xenophobia may have been detectable in recent opposition to the Dubai shipping deal,¹⁹⁸ or in opposition to foreign companies which seek to influence domestic radio and televised broadcasts.¹⁹⁹ It may also be salient in the current debate over immigration policy and the United States-Mexico border.²⁰⁰

Like all group stereotypes, xenophobia is exacerbated by the tendency to ask questions about whether there is evidence to confirm the belief and forgetting to ask whether there is evidence that would disconfirm it.²⁰¹ Social psychologists characterize this tendency as "confirmation bias," or the proclivity to ignore or discount information that challenges existing beliefs.²⁰² Confirmation bias has been

194. See Evan C. Zolden, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 L. & POL'Y INT'L BUS. 573, 621 (2003).

195. See Irene Scharf, *Tired of Your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 HAWAII L. REV. 131, 135-36 (1999).

196. See Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 303 (2003).

197. *Id.* citing Gerald F. Seib & John Harwood, *Oklahoma City Bombing: Oklahoma City Terror May Intensify Hard-Line Views on Crime and Immigration*, WALL ST. J., Apr. 21, 1995, at A12.

198. See Heather Timmons & Leslie Wayne, *U.S. Businesses Are Lining Up Behind Dubai*, N.Y. TIMES, Mar. 8, 2006, at 3.

199. See Vincent M. Paladini, *Foreign Ownership Restrictions under Section 310(b) of the Telecommunications Act of 1996*, 14 B.U. INT'L L.J. 341, 369-70 (1996).

200. See e.g., Bill Hendrick, *Perspectives on Immigration: Carlos del Rio*, ATLANTA J. CONST., Mar. 29, 2006, at 3F (citing remarks by Dr. Carlos del Rio, associate professor of medicine at Emory University School of Medicine).

201. See Hanson & Yosifon, *The Situational Character*, *supra* note 1, at 54; see also Cheryl B. Preston, *Baby Spice: Lost Between Feminine and Feminist*, 9 AM. U.J. GENDER SOC. POL'Y & L. 541, 590 (explaining the pursuit of confirming evidence of group stereotype in setting of females in the workplace).

202. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U.L. REV. 630, 647-50 (1999). A corollary to confirmation bias is "self-serving" or "egocentric" biases, whereby individuals interpret informa-

evidenced in corporate executives²⁰³ and significantly in professional athletes, who after enjoying a positive experience with a team, tend to favorably interpret ambiguous information and to dismiss negative information about that team.²⁰⁴ Consequently, it is possible that some professional athletes, like some persons, harbor xenophobic stereotypes about foreign peoples, and thus likewise suffer from confirmation bias in automatically pursuing and disproportionately emphasizing evidence that supports those stereotypes.²⁰⁵ As a result, a situational fear of terrorism may reflect both underlying belief systems and cognitive errors in how those belief systems are applied.

Two other heuristical devices may be relevant and worthy of future exploration. The "endowment effect," or tendency of individuals to perceive more utility from their current state of affairs than from altered and equivalent circumstances, might motivate professional athletes to prefer to remain in the United States. It can do so by distorting their perception of the associable advantages and disadvantages in playing abroad.²⁰⁶ Second, professional athletes may suffer from optimism bias when considering the risk of terrorism in domestic playing opportunities (i.e., they are aware of a general risk of terrorism, but assume it is less likely as it applies to them), yet suffer from pessimism bias when considering that risk in foreign playing opportunities.²⁰⁷

tion in a way that disproportionately favors their own position. Unlike confirmation bias, however, self-serving or egocentric biases are likely consciously present. See Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, n. 199 (noting that these biases may increase plaintiffs' risk in seeking frivolous litigation); see also Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON PERSPECTIVES 109 (1997) (discussing the impact of self-serving biases on settlements).

203. See Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, n. 146 (2002).

204. See Michael A. McCann, *It's Not About the Money*, *supra* note 39, at 1545-47 (describing contractual decision-making of Jermaine O'Neal and in relation to his decision to resign with the Indiana Pacers in 2003).

205. See Kunda, *supra* note 179, at 111-15, 123-30.

206. See Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 802-03 (2004); see also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (supplying findings that confirm the prevalence of endowment heuristics); Russell Korobkin, *Policy-making and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663 (1994) (discussing endowment heuristics in the context of negotiations).

207. I was unable to identify documented presence of such a paradoxical effect in this and in other settings, but it would make for a fascinating analysis. The presence of optimism

In sum, professional sports leagues, teams, fans, and players respond to the threat of terrorism in both predictable, presumptively "rational" ways and in unpredictable behaviors that seemingly manifest cognitive errors, social norms, and situational influences. More consistent is the larger implication of their responses: professional sports are deeply affected by both terrorism and the threat of terrorism, and, like other industries, struggle to find the appropriate balance between security and freedom. Likewise similar to other settings, professional sports appear highly vulnerable to external social developments and likewise dependent on continued protection of the homeland.

IV. COMMUNICABLE DISEASE AND PROFESSIONAL SPORTS

The final section of this article queries perhaps the most frightening threat to professional sports and, indeed, all of mankind: an outbreak of a highly communicable and lethal disease. This threat has received considerable attention in recent months as the A (H5N1) virus (more commonly known as the "Avian Flu" or the "Bird Flu") has spread from Asia to Europe. Fears persist that it will soon afflict birds in the United States;²⁰⁸ more worrisomely, it may mutate into an easily transmittable, human-to-human strain.²⁰⁹ Aside from the Bird Flu, scientists are troubled by the overprescription of antibiotics, with strains of various bacteria becoming increasingly resistant to existing medicines.²¹⁰ Insufficient supplies of vaccines also strike fear in public health officials.²¹¹ These fears resonate with the general public, as evidenced by public opinion polls that confirm prevalent unease to-

bias and domestic terrorism has been studied. See e.g., Feigenson, *supra* note 57. But I have not found it studied in the context of terrorism that happens abroad, or its interplay with optimism bias and domestic terrorism.

208. See Dan Mitchell, *Betting on Bird Flu*, N.Y. TIMES, at 5; Lara Jakes Jordan, *Migration May Bring Fatal Type of Bird Flu*, STAR-LEDGER, Mar. 10, 2006, at 6 (citing comments by Homeland Security Secretary Michael Chertoff that the bird flu may hit the United States by May 2006).

209. See generally Brendan M. O'Malley, *Merck v. Integra: A Safe Harbor for the Commercial Use of Biotechnology Research Tools?*, 23 CARDOZO L.J. 739, 739-42 (2006); Elizabeth Rosenthal, *Recent Spread of Bird Flu Confounds Experts*, N.Y. TIMES, Mar. 6, 2006, at 6.

210. See *Overuse of antibiotics causing severe illness and fatalities in U.S. and Canada*, HEALTH FACTS, Jan. 1, 2006, at 4; Michael D. Lemonick, *Guerrilla Warfare*, TIME, Fall 1996 (special issue: The Frontiers of Medicine), at 58.

211. See Sabin Russell, *Statewide Flu Plan for Public Input*, SAN. FRAN. CHRON., Jan. 19, 2006, at B1 (citing report by the California State Department of Health).

wards a potential endemic,²¹² and by popular books and films that portray doomsday outbreaks (e.g., “28 Days Later,” “Dawn of the Dead,” “The Stand”).

At first glance, it appears unnecessary and perhaps nonsensical to study how a pandemic would affect professional sports. Aside from the obvious deduction that most sporting events would be canceled, sports would quickly recede from our attention and likely become mere trivial memories from a better time. Put another way, whether the Red Sox or Yankees have a better pitching staff or whether Barry Bonds used steroids would suddenly seem a lot less important if everyday, person-to-person contact were jeopardized.

All pandemics are not the same, however, and not all lead to apocalyptic endings. For that reason, this section considers confined “outbreak” scenarios that could jeopardize professional sports, such as the threat of a looming pandemic in the United States or a pandemic occurring in other countries. Neither the threat of a looming pandemic nor a pandemic occurring elsewhere requires much imagination, as both emerged just three years ago with a global outbreak of Severe Acute Respiratory Syndrome (“SARS”). SARS is a viral respiratory illness derived from a coronavirus, a genus of animal virus that primarily infects the upper respiratory and gastrointestinal tract.²¹³ Coronaviruses are the second leading cause of the common cold in human adults, and are spread through person-to-person contact.²¹⁴ Unlike most coronaviruses, SARS impairs both the lower and upper respiratory tracts and inflicts a mortality rate of approximately

212. See e.g., Dalia Sussman, *Poll: Most Worried about Bird Flu, But Confident About Government Response*, ABC NEWS POLLING, Mar. 12, 2005, available at <http://abcnews.go.com/Health/AvianFlu/story?id=1701213> (reporting that 66 percent of Americans are worried about the Bird Flu); *While Concerned, Most Americans Do Not Expect Widespread Human Cases of Avian Flu in the Next Year*, HARV. SCHOOL PUBLIC HEALTH POLLING, Feb. 23, 2006, available at <http://www.hsph.harvard.edu/press/releases/press02232006.html> (finding that 57 percent of Americans are concerned about the potential spread of bird flu in the United States).

213. See *Basic Information about SARS*, CENTERS FOR DISEASE CONTROL AND PREVENTION, May 3, 2005, available at <http://www.cdc.gov/ncidod/sars/factsheet.htm>; Fang Li et al., *Structure of SARS Coronavirus Spike Receptor-Binding Domain Complexed with Receptor*, 309 SCIENCE 1864 (2005).

214. See *Definition of Coronavirus*, MEDICINE NET.COM, at <http://www.medterms.com/script/main/art.asp?articlekey=22789> (last visited, Aug. 26, 2006); Alan L. Bisno, *Acute Pharyngitis: Etiology and Diagnosis*, 97 PEDIATRICS 949, 954 (1996) (supplying clinical information on coronavirus and the common cold); Stephanie J. Schrag et al., *SARS Surveillance During Emergency Public Health Response*, 2 EMERGING INFECTIOUS DISEASES 185 (2004) (discussing challenge of SARS to public health).

10 percent due to rapid progression and resistance to antimicrobial therapy.²¹⁵

The SARS epidemic began in the Chinese Province of Guangdong in November 2002 and with the aid of intercontinental travel, swiftly spread worldwide.²¹⁶ By the spring of 2003, it had appeared in at least 28 countries, including the United States and Canada, and infected persons were identified in five different continents.²¹⁷ By May 2003, almost 8,500 persons were infected and 813 people had died.²¹⁸ The vast majority of infections and deaths occurred in China and Hong Kong,²¹⁹ although 27 Americans and 251 Canadians were infected, and 43 of those Canadians died.²²⁰

Faced with a potential global pandemic, health and homeland security officials in affected countries resorted to various containment policies. Many nations, for instance, resorted to travel restrictions or, like the United States, travel advisories and travel alerts²²¹ that discouraged citizens from traveling to significantly afflicted nations.²²²

Perhaps most controversially, a number of countries (although not the United States)²²³ turned to quarantines, where masses of people, many of whom are healthy but potentially exposed to a communicable containment, are isolated in a fixed area. In Toronto, for instance, more than 14,000 people were quarantined under threat of a

215. *Id.*

216. See *Severe Acute Respiratory Syndrome is Focus of Review*, L. & HEALTH WEEKLY, Jan. 28, 2006, at 447.

217. See Jong-Wha Lee, *Globalization and Disease: The Case of SARS*, ASIAN ECONOMIC PAPERS, Winter 2004, at 113.

218. *Id.*

219. *Id.*

220. See World Health Organization, *Summary of probable SARS cases with onset of illness from 1 November 2002 to 31 July 2003*, available at http://www.who.int/csr/sars/country/table2004_04_21/en/index.html.

221. According to the U.S. Centers for Disease Control, a travel advisory recommends that non-essential travel to an area be postponed. In contrast, a travel alert does not advise against travel to a particular area, but informs travelers of a health concern and provides advice about precautions they can take to reduce their risk of exposure. See Office of Communication at the Centers for Disease Control, *CDC Reinstates Travel Alert for Toronto*, May 23, 2003, available at <http://www.cdc.gov/od/oc/media/pressrel/r030523.htm>.

222. See e.g., *SARS: CDC confirms Singapore is in the clear*, MEDICAL LETTER ON THE CDC & FDA, July 6, 2003, at 47.

223. Although a quarantine was never ordered in the United States, President George W. Bush adds SARS to the list of "quarantinable diseases" in April 2004, thereby empowering the CDC to isolate persons who might have been exposed to the disease. See *SARS: Timeline of an Outbreak*, WEBMD, at <http://www.webmd.com/content/article/63/72068.htm> (last visited, Aug. 26, 2006).

\$5,000 fine.²²⁴ These persons were ordered to isolate themselves at home for 10 days, wear masks, avoid contact with household members, and monitor themselves for symptoms of SARS.²²⁵ Other countries resorted to more onerous techniques: In China, death was the maximum possible penalty for noncompliance, while in Taiwan and Singapore, video monitoring of people quarantined at home was common.²²⁶ One study of SARS-related quarantines identified high compliance, irrespective of nationality or quarantine style.²²⁷ Most quarantined persons cited civic pride, law-abidingness, and external social pressures as spurring compliance.²²⁸ However, another study found that SARS-related quarantines inflicted substantial emotional, psychological, and financial hardship on those persons.²²⁹

Although uncertainty lingers as to whether quarantines and other measures were clinically effective in containing SARS,²³⁰ infections plummeted in the second half of 2003, and few infections have been reported since that time.²³¹ For all intents and purposes, SARS has “vanished” from Earth.²³²

The SARS epidemic supplies a useful mode of analysis for studying professional sports in a setting of a looming pandemic that contemporaneously afflicts foreign peoples. Indeed, SARS stirred far more anticipatory fear than actual ailment in the United States, while genuinely distressing those who weighed international travel. Such an inquiry is especially engaging when considering the Toronto Blue Jays, a Major League Team that played games in a SARS-afflicted city, and featured players, media, and fans with ties to the United States.

Before studying the Blue Jays, however, first consider the magnitude of the crisis surrounding Toronto, the North American city

224. See Maureen A. Cava et al., *Risk Perception and Compliance with Quarantine During the SARS Outbreak*, 37 J. NURSING SCHOLARSHIP 343 (2005).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. See generally R.J. Blendon et al., *The Public's Response to Severe Acute Respiratory Syndrome in Toronto and the United States*, 38 CLINICAL INFECTIOUS DISEASES, 925-931 (2004).

230. *Id.* For instance, in Toronto, only 27 formal quarantine orders were issued, meaning the vast majority of the more than 14,000 persons quarantined willingly followed quarantine “recommendations.” *Id.*

231. See Jim Yardley, *After Its Epidemic, SARS Vanishes*, N.Y. TIMES, May 15, 2004.

232. *Id.*

most affected by the virus. As intimated above when discussing quarantines, SARS radically affected Toronto and its inhabitants.²³³ The virus first appeared in Toronto in March 2003,²³⁴ within two months, it had claimed the lives of 21 residents and infected nearly 200 others.²³⁵ Although city leaders downplayed the outbreak,²³⁶ particularly since a mere fraction of a percent of the city's 5.2 million residents were infected,²³⁷ they engaged in sweeping operational changes, such as instituting quarantine policies and closing schools after infected students were found to be in attendance.²³⁸ Disturbingly, some residents became the targets of "disease witch hunts." Most notably, a college professor living in Toronto became the subject of front page headlines when suspicions arose about her flu-like symptoms and her supposed capacity to "infect" students (she only had the flu).²³⁹ Taken together, while the actual threat of SARS to Torontonians was extremely low, it elicited behavioral responses consistent with a grave and impending hazard.

Foreign actors also responded with striking trepidation. For instance, the U.S. Centers for Disease Control issued travel alerts to Americans contemplating travel to Toronto,²⁴⁰ while the World Health Organization ("WHO") expressly discouraged any non-urgent travel to the city.²⁴¹ Corporate actors similarly avoided activity with the city. Cruise lines, for instance, announced that they would not

233. See *infra* p. 39.

234. See *SARS: Timeline of an Outbreak*, *supra* note 216.

235. See Tatsha Robertson, *Communities Suffer as SARS Fear Spread*, BOSTON GLOBE, May 5, 2003, at A1.

236. See e.g., Matt Porio, *CDC Says Vigilance Needed on SARS*, NEWSDAY, Apr. 30, 2003, at A18 (citing remarks by Canadian public health officials who claimed that Toronto was as safe as Paris, London, or Washington, D.C.).

237. See Thomas Brinkhoff, *Populations for Canada Metropolitan Areas*, CITY POPULATION, available at <http://www.citypopulation.de/Canada.html> (last visited Aug. 26, 2006) (listing population of Toronto).

238. See *SARS Kills 2 More in Toronto*, CHI. TRIB., May 29, 2003, at 6 (detailing school closing after two nearby residents died from SARS); Robert Ballantyne, *Markham High School Shut, 1,700- Quarantined*, LONDON FREE PRESS, May 29, 2003, at A5 (discussing school closing when student attended classes with SARS).

239. See Charles P. Pierce, *Epidemic of Fear: How the SARS Scare Played into America's Culture of Panic and then, Just as Quickly, Faded from the Headlines*, BOSTON GLOBE MAG., June 1, 2003, at 10.

240. See Thomas H. Maugh, II, *Toronto Fears New SARS Outbreak*, L.A. TIMES, May 24, 2003, at 1.

241. See Shi Davidi, *Blue Jay fans hope to send world a message by filling SkyDome*, Apr. 30, 2003, available at Lexis/Nexis News Wire.

take passengers from Toronto,²⁴² while industry conferences and school trips were cancelled, as were rock concerts and other entertainment happenings.²⁴³ Economists projected that Toronto lost up to \$30 million a day from canceled or unrealized business engagements.²⁴⁴

The circumstances in Toronto understandably altered operations of the Toronto Blue Jays. However, despite calls for Blue Jays' games to be canceled, the team elected to play all home games during the outbreak.²⁴⁵ Blue Jays players publicly endorsed this strategy, some quite vehemently. For instance, outfielder Vernon Wells opined that playing the games would "show the rest of the world the truth about Toronto. The scare is not as bad as it's been made out to be."²⁴⁶ Third baseman Eric Hinske similarly remarked that the magnitude of SARS in Toronto was "way blown out of proportion. We don't even think about it. You have a better chance of catching the flu than SARS."²⁴⁷ Perhaps most revealingly, no Blue Jay publicly acknowledged worry about contracting SARS through regular employment activities.²⁴⁸

Some players on competing teams, however, appeared aghast at the prospect of traveling to Toronto. For instance, Anaheim Angels pitcher Kevin Appier suggested that Major League Baseball reschedule a series between his team and that of the Blue Jays because of "people dying."²⁴⁹ Likewise, teammate David Eckstein worried, "it's something that's very much unknown, and I think the unknown factor is what is scary about it. You might come in contact with someone

242. See e.g., *World Health Organization warns against traveling to Toronto*, BEIJING BECAUSE OF SARS, CNBC NEWS TRANSCRIPTS, Apr. 23, 2004, available at Lexis/Nexis News Wire (citing Crystal Cruise Line's decision).

243. See *SARS Deaths are on the Rise*, ATLANTA J. CONST., Apr. 30, 2003, available at Lexis/Nexis News Wire; see also Kevin McGran, *SARS Spooks Travelers to City*, TORONTO STAR, Apr. 24, 2003, at D1 (noting cancellation of conferences and school trips).

244. *Id.*

245. See *Jays: Health Comes First*, OTTAWA SUN, Apr. 25, 2003, at 99 (citing remarks by Blue Jays president and CEO Paul Godfrey).

246. See Davidi, *supra* note 233.

247. See Cory Jennerjohn, *Down But Not Out*, OSHKOSH NORTHWESTER, May, 29, 2003, at 1D.

248. I was unable to find commentary from any player on the Blue Jays concerning worry about the risk of contracting SARS by playing games or otherwise partaking in team activities. A number of players expressed general reservations about living in Toronto, but none spoke of a specific concern pertaining to their employment.

249. See Ben Bolch & Bill Shaikan, *Toronto Trip is a Concern*, L.A. TIMES, Apr. 24, 2003, at 1.

who comes in the clubhouse and sneezes.”²⁵⁰ Specific events also triggered suspicions: New York Yankees third baseman Todd Zeile opined that teammate Derek Jeter, who had suffered a shoulder injury in a game, might have been exposed to SARS when he was taken to a Toronto hospital,²⁵¹ while Kansas City Royals’ outfielder Dee Brown doused his Toronto hotel room with disinfectant, believing that doing so would reduce the risk of infection.²⁵²

As other players conveyed unease at the prospect of traveling to Toronto, MLB and the Major League Players Association dispatched medical experts to meet with players and to inform them of how to minimize the risk. Aside from stressing the extreme unlikelihood of infection, they instructed players to regularly wash hands, avoid large crowds, and only sign autographs using their own pens.²⁵³ Even after these meetings, however, some players remained unconvinced.²⁵⁴ This lingering suspicion led some teams to advise personnel with existing illnesses to stay in the United States, and players’ families were similarly discouraged from travel.²⁵⁵

Certain members of the out-of-town press corps also expressed reservation or even spurned coverage assignments. For instance, Michael Smith, an ostensibly healthy, 23-year old reporter for the *Boston Globe*, refused to travel to Toronto to cover a Red Sox-Blue Jays series.²⁵⁶ He based his decision on the WHO’s recommendation that “unnecessary travel” to Toronto be avoided.²⁵⁷ Smith’s decision sparked criticism, particularly when he was compared to other reporters who were willing to cover the Iraq War and other dangerous locales.²⁵⁸

250. *Id.*

251. *Id.*

252. See Clifford Krauss, *The SARS Epidemic: Sports*, N.Y. TIMES, Apr. 27, 2003, at 19.

253. See Steven Krasner, *Threat of SARS Taken Seriously*, PROV. J.-BULL., May 29, 2003, at C05.

254. See Bolch & Shaikan, *supra* note 241 (citing remarks by Kevin Appier and Mike Bordick of the Anaheim Angels).

255. For instance, Red Sox pitching coach Tony Cloninger, who was undergoing treatment for bladder cancer, skipped a trip to Toronto because it was thought that his weakened immune system would be more vulnerable to a SARS infection. See Krasner, *supra* note 245.

256. See Gaylee Fee & Laura Raposa, *Inside Track*, BOSTON HERALD, June 3, 2003, at 18 (discussing decision of *Globe* reporter Michael Smith to not attend games in Toronto); see also Steve Silva, *A Message to Michael*, BOSTON DIRT DOGS, June 2, 2003, available at http://www.bostondirtdogs.com/Headline%20Archives/Daily_Headlines_June_2003.htm (supplying Smith’s age and other background information).

257. See Silva, *supra* note 248 (quoting Smith).

258. *Id.*; see also Fee & Raposa, *supra* note 238 (for additional critique).

In *theory*, these unwilling actors manifested an “irrational fear.” Consider the profound unlikelihood of contracting SARS: in a nearly three-month span, SARS infected 251 out of approximately 5,200,000 Torontonians (or about one out of every 20,700 Torontonians); it killed 43 of those persons (or about one out of every 121,000 Torontonians). Assuming, for the sheer sake of simplicity, that all of the 251 infected persons would have presented an active risk to ballplayers and media, compare that risk with the probability of those actors having succumbed to other ailments while remaining in the United States. For instance, consider that each year approximately one out of every seven Americans contracts the flu,²⁵⁹ that one out of every 8,300 Americans dies from it, and that the flu is just as easily transmitted as SARS.²⁶⁰ Or consider that the annual risk of suffering an injury in the home that will necessitate medical attention is one in 13.²⁶¹ Or consider that in most American homes, there is at least a 20 percent chance that the local water supply is not sufficiently chlorinated to kill infectious bacteria.²⁶² In other words, the players and media’s risk of contracting SARS in Toronto probably paled in comparison to more common risks they undertook by remaining at or near their homes.

Yet in *practice*, these actors behaved predictably and akin to the behavior of many persons in that situation. Indeed, people tend to suffer sudden and heightened fear of new or foreign risks.²⁶³ This phenomenon has proven especially apparent at the onset of an infectious disease threat. To illustrate, consider the reaction of many New Yorkers to the arrival of the West Nile virus in the summer of 1999. The mosquito-borne virus had never before been seen in the United

259. See *Avoid the Flu Bug: Get Your Flu Shot Now!*, UNIV. MICH. HEALTH UPDATE, Oct. 1, 2004, available at <http://www.med.umich.edu/opm/newspage/2004/hmflu.htm> (noting that between 25,000 and 50,000 Americans succumb to the flu each year).

260. See *Worry vs. Reality: The Real Risks you Face*, WEB MD, Feb. 18, 2004, at <http://medmutual.com/global/webmd/WebMDArticle.aspx?id=97245&aType=Senior> (indicating that 36,000 Americans die from the flu each year) (calculation assumes 298,444,215 Americans, as indicated by the Central Intelligence Agency for July 2006, available at <http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html> (last visited Aug. 26, 2006)).

261. See Jeffrey Kluger, *Risky Business: Risks of Everyday Hazards*, DISCOVER, May 1996, available at http://www.findarticles.com/p/articles/mi_m1511/is_n5_v17/ai_18199110 (last visited, Aug. 26, 2006).

262. *Id.*

263. See Dana Ziker, *What Lies Beneath: An Examination of the Underpinnings of Dietary Supplement Safety Regulation*, 31 AM. J. L. & MED. 269, 275 (2005).

States. Although it infected only 55 persons and killed seven,²⁶⁴ it prompted panicked headlines and dire news accounts, such as the *New York Times* which declared a "West Nile Epidemic."²⁶⁵ Similarly revealing, while the risk of dying in this "Epidemic" was less than one in 1,000,000, residents demanded widespread spraying of environmentally-compromising pesticides.²⁶⁶ Yet by 2002, the virus no longer seemed exotic, and while its risk of contraction remained constant, it no longer generated widespread fear or overcautious behavior.²⁶⁷ Accordingly, the hesitancy of "foreign" players and media to travel to Toronto seemingly comported to a predictive pattern of situational behaviorism at the onset of an infectious disease outbreak.

The Blue Jays undertook preventative, although revenue-conceding actions to ameliorate this "irrational" fear of SARS on fan attendance. Most notably, the team discounted ticket prices from an average of \$20 to \$1 or \$2 and, particularly to attract out-of-town persons interested in game attendance, offered massively-discounted travel packages that included game tickets, theatre events, dinners, and hotel accommodations.²⁶⁸ Remarkably, game attendance actually rose 19 percent during the SARS outbreak,²⁶⁹ although revenue still plummeted due to the severe markdowns.²⁷⁰

Aside from responding to obvious economic incentives in attending games, fans voiced a desire to combat stigma. Some held up signs that declared "*Catch the Ball, Not SARS*," and "*Toronto has All-Stars not All-SARS*,"²⁷¹ while others characterized their attendance as discrediting ominous news stories and debunking admonitory travel advisories.²⁷² Along those lines, Blue Jays President and CEO Paul

264. See Karen Charman, *West Nile Attack*, FAIR, Nov./Dec/ 2000, available at <http://www.fair.org/extra/0011/west-nile.html>.

265. See *The West Nile Epidemic*, Opinion Editorial, NEW YORK TIMES, Aug. 25, 2002, at 8.

266. See Charman, *supra* note 256.

267. See Kiker, *supra* note 255, at 275.

268. See Steve Erwin, *SARS Outbreak Proves Costly to Jays*, HAMILTON SPECTER, July 18, 2003, at E04; see also CP, *Rogers Takes a Hit to Fill Skydome*, BROCKVILLE RECORDER & TIMES (Ontario, Canada), Apr. 29, 2003, at B2 (noting average ticket price of \$20 and loss of approximately \$700,000 per game from ticket-price reduction plan).

269. See Joe Lapointe, *Attendance Continues its Slow Slide*, N.Y. TIMES, July 17, 2003, at D2.

270. See Erwin, *supra* note 260.

271. See CP, *Sellout in Spite of SARS*, FORT MCMURRAY TODAY (Alberta, Canada), Apr. 30, 2003, at B1.

272. See e.g., Mark Zwolinski, *Jays Fans Support City*, TORONTO STAR, Apr. 30, 2003, at C01 (interviewing fan Joe Moss).

Godfrey praised those in attendance for dispelling the "old-fashioned leper colony" reputation that was gradually attaching to the city.²⁷³

The enthusiasm of Blue Jays management, players, and fans to counter external suspicions of Toronto appears corroborative of a community effect, whereby salient social norms propel otherwise independent individuals to coalesce around a common cause.²⁷⁴ In this instance, Toronto's survival was the animating common cause. Of course, Torontonians may have also possessed self-identity concerns, since persons associated with a stigmatized locale can themselves become stigmatized.²⁷⁵ Nevertheless, the sense of community so apparent during Blue Jays games intimates the power of surroundings in directing individual behavior.

This power of surroundings is especially apparent when considering the "coercive power of situations" or situational power.²⁷⁶ Situational power is frequently described as "situationism," the concept that human behavior primarily reflects contextually-induced responses rather than individualized choices. Put another way, situationism is the idea that the surrounding situation—what out senses perceive, both consciously and subconsciously—moves us more than we move it. As revealed by social psychologists Stanley Milgram²⁷⁷ and John Darley,²⁷⁸ situationism is especially apparent in group settings, as group members tend to automatically endorse and mimic the behavior of other members. Legal scholars, such as Jeffrey Rachlinski and Howard Koh, have similarly described the "intense, internal" pressures of individuals to conform to apparent community expectations.²⁷⁹ Indeed, despite the popular assumption that individuals in democratic settings enjoy the "right" to free will and maximiza-

273. See Eli Shupak, *Blue Jays' Paul Godfrey sees similarities between Toronto, Israel*, CANADIAN JEWISH NEWS, June 26, 2003, at 38.

274. See generally John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1243 (1995).

275. See *infra* p. 10 (explaining courtesy stigma).

276. See Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT. L. REV. 1537, 1566 (2000).

277. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

278. See generally John M. Darley & C. Daniel Batson, *"From Jerusalem to Jericho": A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973).

279. See Harold Hongju Koh, *How to Influence the States: Internalization through Socialization*, 54 DUKE L.J. 975, 980-81 (2005); see generally Rachlinski, *supra* note 268, at 1566.

tion of preferences, there exists considerable evidence that we are deeply captured by the situation around us, and that it propels us in often unappreciated ways.²⁸⁰

Of course, the situational power of a community threatened by an infectious disease does not necessarily posit socially-undesirable behavior. When observing a SARS-afflicted Toronto, certain behaviors indeed warranted concern (e.g. disease witch hunts; demoralizing and over-inclusive quarantines), yet one cannot but help to admire the healing power of sports. Just consider how baseball games drew people together, not only to dissipate fear of one another, but also to dispel false assumptions about the city and its healthiness. In other words, while situationism in crises may beget mixed behavior, perhaps its application to professional sports accentuates the positive.

Yet how might professional sports actors have behaved had SARS worsened or persisted, rather than subsided, over the summer and fall of 2003? Consider the effect of that situation on MLB players. If the Blue Jays had continued to play their games with consent from MLB, it stands to reason that some players would have refused to travel to Toronto. Unsurprisingly, MLB and the Major League Baseball Players' Association ("MLBPA") have collectively-bargained language that requires players to report to games played by their teams.²⁸¹ A player's failure to do so can trigger a suspension, during which time he would not be paid.²⁸² Although common sense suggests that MLB would have canceled or rescheduled games in the event of an intensified SARS crisis or numerous players boycotting travel,²⁸³ players would have otherwise risked significant financial penalty by staying home.

280. See David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 923 (1996) (discussing presumptions of American liberalism and unrestrained individual decision-making); see also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 202-23 (2003) (exploring salience of deep capture on human thinking).

281. See e.g., 2003-2006 *Basic Agreement, Schedule A, 6.(d)*, at 210, available at http://www.businessofbaseball.com/docs/2002_2006basicagreement.pdf (last visited Aug. 26, 2006) (noting that a player must promptly report to his team during the season upon written notice by the team).

282. See generally *Id.*, Art. XII, at 41 (describing procedures for disciplining a player).

283. Indeed, MLB Commissioner Bud Selig assured players, media, and fans that games at Toronto would be canceled or re-scheduled had SARS escalated in severity. See DeNeen L. Brown, *In Toronto, Fear Strikes Out*, WASH. POST, Apr. 27, 2003, at A32; Etan Vlessing, *Toronto SARS Fear Routs Canadian Cable TV Meet*, HOLLYWOOD REPORTER, Apr. 25, 2003, available at Lexis/Nexis News Wire.

This hypothetical scenario would have also led some American media to reconsider assignments to cover Blue Jays games or any events in Toronto. Could they have refused those assignments and still kept their jobs?

Relevantly, although the *Boston Globe* did not terminate the employment or otherwise sanction Michael Smith for refusing to cover a Red Sox-Blue Jays series, it may have been within its legal rights to do so. The *Globe's* capacity would have rested on whether Smith was a member of the Newspaper Guild-Communication Workers of America ("Guild"), a labor union for newspaper journalists and staff. The Guild's contract provides that reporters may refuse assignments if they reasonably believe that they would be risking death or serious injury.²⁸⁴ Considering that both the CDC and WHO had issued travel warnings, and that Smith had reasoned his decision on those warnings, his behavior would have likely been considered reasonable. Therefore, if he was a Guild member, any sanction against him could have triggered the filing of unfair labor practices charges with the National Labor Relations Board.²⁸⁵ But if he was not a member, then he would have only obtained the meager "protection" of at-will employment.²⁸⁶ Thus, from a practical standpoint, a reporter's membership in the Guild would have largely calibrated his ability to refuse Toronto assignments and not simultaneously endanger his employment.

As an alternative hypothetical, consider how a worsened SARS pandemic in Asia might have affected professional sports actors. Certainly, professional sports teams would have been poised to cancel scouting trips to Asia, thereby impairing player developmental interests. Similarly, any exhibition games scheduled there may have warranted cancellation. Although obvious in light of the circumstances, those decisions could have severely undermined efforts by American pro leagues to attract Asian fans, particularly if local Asian media had criticized those decisions as xenophobic.²⁸⁷

284. See *Maine Event*, AM. JOURNALISM REV., Mar. 2001, at 10.

285. See Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 256-57 (1993) (explaining legal remedies for unionized reporters).

286. See Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1153 (2000) (noting that at-will reporters can be fired without cause, provided it is not for a discriminatory purpose).

287. For a thorough review of efforts by the four major sports leagues to expand into the Asian market and other foreign markets, see Frank Fitzpatrick, *As International Players Ar-*

Other choices may have been more vexing. For instance, American baseball players under contract to Japanese teams might have been tempted to renege on their contracts and return home. Their return to the United States would have presented MLB teams with a contractual dilemma: Should they extend big-league or minor-league contracts to players who were in breach of Japanese employment contracts? Such a scenario has never occurred, but according to the *United States-Japanese Player Contract Agreement*,²⁸⁸ ("Agreement") an agreement signed by MLB and Japan's Nippon Professional Baseball ("NPB") league in 1998, an MLB team must receive permission from the NPB in order to seek employment of a player under contract to a Japanese team, and if granted, the player would then be "posted" and bid on by all MLB teams.²⁸⁹ A literal interpretation of the Agreement would therefore have restrained teams from directly employing Americans players who were in breach of Japanese employment contracts.

On the other hand, those players may have argued that SARS triggered a contractual impossibility, which legally sanctions breach. Contractual impossibility dictates that a party should not held liable for breach if it was caused by an unforeseeable and uncontrollable impediment.²⁹⁰ Similarly, frustration of purpose may have provided relief, since significant factual changes (such as, perhaps, an infectious disease outbreak) could have obliterated the employment contract's meaning, as could have mutual mistake, which occurs when both parties, at the time of contracting, share a misconception about a

rive, *Big 4 Tapping into Global Markets*, PHIL. INQUIRER, Nov. 3, 2005, at 10.

288. See http://jpbpa.net/convention/2001_e.pdf; see also Casey Duncan, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87 (2003) (supplying extensive analysis on legal relationship between MLB and JPN); Krikor Meshefejian, *The Global Reach of America's Pastime: Antitrust Implications of the US-Japanese Player Contract Agreement*, J. BUS. L. SOC'Y, Oct. 25, 2005, available at http://iblsjournal.typepad.com/illinois_business_law_soc/2005/10/the_love_of_the.html (supplying an antitrust analysis of relationship between MLB and JPN).

289. *Id.* As a separate point, the Agreement does not cover independent baseball leagues, and teams in those leagues could presumably pursue such a player's employment services.

290. See Mark B. Baker, *"A Hard Rain's A-Gonna Fall" - Terrorism and Excused Contractual Performance in a Post September 11th World*, 17 TRANSNAT'L L. 1, 14-16, 25-26 (2004); see also Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1375 (1982) (describing potential for unjust costs if impossibility was not recognized in certain contractual circumstances).

basic assumption upon which they based their agreement.²⁹¹

However, those contractual defenses are typically difficult to establish, since courts are reluctant to equate unexpectedly difficult or uncomfortable circumstances with impossible circumstances.²⁹² Similarly, courts are often weary of reconstructing what the parties would have negotiated *ex ante*, as doing so risks more speculative assessment than informed deliberation.²⁹³ Moreover, the presence of a Japanese employer would have complicated jurisdictional matters, thereby supplying American teams with another reason to avoid pursuing these players.²⁹⁴

Perhaps the best argument for these players would have concerned contractual intent: the Agreement intends to govern American teams that seek to employ players of Japanese ethnicity under contract to Japanese teams, and not American players under contract to those teams.²⁹⁵ While promising in theory, as the Agreement did not expressly or impliedly contemplate American players, such a line of reasoning would have likely failed to overcome the other conceptual and practical drawbacks of employing them.

As a final consideration, a heightened SARS outbreak in Asia might have led to discrimination of Asian and Asian-American players on American teams. Professional athletes in America have long

291. See Mark A. Glick, Darren Bush, and Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 383-87 (2002); see also Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 845-47 (2003) (explaining how courts and scholars assess the economics of mutual mistake).

292. See e.g., *Liner v. Armstrong Homes of Bremerton*, 579 P.2d 367, 370 (Ct. Wash. 1978) (noting that "the mere fact that a contract's performance becomes more difficult or expensive than originally anticipated does not justify setting it aside"); *Wilson v. Colorado Interstate Gas Co.*, 1987 U.S. Dist. LEXIS 3665, *6 (stating that "a party has an extremely difficult burden in trying to establish a frustration of purpose or commercial impracticability defense"); *B. L. Ivey Constr. Co. v. Pilot Fire & Casualty Co.*, 295 F. Supp. 840, 845 (N.D. Ga. 1968) (holding that "we do not think that defendant has borne the difficult burden imposed on him . . . of showing mutual mistake").

293. See Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 38-54 (1991); but see Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1520 (remarking that "most academic commentary and case law support the remedies of . . . impossibility").

294. See generally Keivn M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L.J. 1 (2004); Akihiro Hironaka, *Jurisdictional Theory "Made in Japan": Convergence of U.S. and Continental European Approaches*, 37 VAND. J. TRANSNAT'L L. 1317 (2004).

295. See Elliot Z. Stein, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues*, 13 CARDOZO J. INT'L & COMP. L. 261, 264-65 (2005).

been the target of racial and ethnic discrimination. Perhaps most notably, the first African-Americans allowed to play in the MLB endured harsh bigotry.²⁹⁶ Most commonly, they were ostracized by teammates, heckled by fans, and recipients of death threats by strangers.²⁹⁷ Such bigotry was also apparent thirty years later, as when Henry Aaron of the Atlanta Braves was poised to break Babe Ruth's homerun record in 1974, he received numerous death threats and over 900,000 pieces of mail, many of which contained "vile, if not hostile" messages.²⁹⁸ Although less common and overt, racial discrimination of African-American athletes persists today.²⁹⁹

Moreover, even though Asian governments contained SARS before it evolved into a widespread pandemic, and even though only 27 Americans contracted it (about one out of every 11 million Americans),³⁰⁰ SARS evoked marked discrimination of Asians and Asian-Americans living in the United States. Consider findings from a recent U.S. National Center for Infectious Diseases' study on how SARS shaped American behavior:

During the SARS outbreak, some persons became fearful or suspicious of all people who looked Asian, regardless of their nationality or actual risk factors for SARS, and expected them to be quarantined. Some Americans did not understand that quarantine and isolation practices appropriate for SARS-affected areas in Asia, where community transmission was a concern, were practices that were not appropriate in the United States where the disease was not community

296. See Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287 (1996). On the other hand, by allowing African-American players to obtain employment from MLB teams, MLB was considered one of the first national institutions, public or private, to promulgate anti-discrimination policies following World War II. See Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 251 (1998).

297. See James R. Devine, *The Past as Moral Guide to the Present: The Parallel Between Martin Luther King, Jr.'s Elements of a Nonviolent Civil Rights Campaign and Jackie Robinson's Entry onto the Brooklyn Dodgers*, 3 VILL. SPORTS & ENT. L.J. 489, n. 288 (1996) (discussing death threats against African-American players); Jeff Jacobs, *For Green, Jitters Never Subsided*, HARTFORD COURANT, Apr. 15, 1997, at G2 (describing how former Red Sox player Pumpsie Green had to overcome the prejudice of fans and lingering racism in baseball).

298. See John H. Morris, *Do My Rights Get in the Way of My Freedom?, An Examination of the Role of Rights in a Society of Empowered People*, 1 MARGINS L.J. 83, n. 5 (2001).

299. See Williams, *supra* note 288, at 289.; see generally Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 7 U. PA. J. LAB. & EMP. L. ____ (forthcoming, 2006) (postulating possible role of race in efforts by NBA to curtail player autonomy) (draft available at <http://papers.ssrn.com/abstract=878611>).

300. I simply divided 300,000,000—which approximately represents the U.S. population—by 27.

acquired.³⁰¹

According to the study, Americans routinely expressed fears of “Asian” merchandise and goods, as well as fears of working with persons of Asian appearance, living near or going to school with them, and sitting near them on airplanes.³⁰² Remarkably, those who engaged in such bigotry failed to appreciate that the vast majority of Americans of Asian descent were born in the United States and had never traveled to SARS-affected areas (let alone failing to recognize that, as noted above, only one out of every 11 million Americans had SARS).³⁰³ Although there were no reports of professional athletes suffering racial or ethnic discrimination due to SARS, it seems plausible to expect that such discrimination may have arisen had SARS worsened.

Thankfully, of course, the SARS outbreak ended before any of the aforementioned scenarios could occur. Yet with the growing threat of the Bird Flu and other contagions, professional sports actors may eventually confront the concerns addressed above. Although sports may supply a healing effect for communities stricken by communicable disease, cognitive biases, social norms, and situational influences often beget deleterious behaviors. For that reason, legal safeguards are essential for the protection of individual autonomy and livelihood otherwise endangered in a disease crisis.

V. CONCLUSION

The purpose of this article was to examine how professional sports actors are influenced by calamities, and to postulate how legal frameworks may mollify their responses. The four calamities studied were catastrophic weather, natural disasters, terrorism, and communicable disease. Each revealed the fragility and imperfection of profes-

301. See Bobbie Person et al., *Fear and Stigma: The Epidemic Within the SARS Outbreak*, 2 EMERGING INFECTIOUS DISEASES 358 (2004). Similar discrimination occurred in Canada. See generally Colleen M. Flood & Anthea Williams, *A Tale of Toronto: National and International Lessons in Public Health Governance from the SARS Crisis*, 12 MICH. ST. J. INT'L L. 229 (2004); see also Justin Schram, *Personal Views: How Popular Perceptions of Risk from SARS Are Fermenting Discrimination*, 326 BRIT. MED.J. 939 (2003) (detailing how Asian-Canadians living in Toronto were the subjects of prejudice).

302. *Id.*

303. See Mel Kohn, M.D., *In My Opinion SARS Stigma is Based on Fear, Not Fact*, Opinion Editorial, OREGONIAN, May 29, 2003, at D07; see also Iris Chang, *Fear of SARS, Fear of Strangers*, Opinion Editorial, N.Y. TIMES, May 21, 2003, at 31 (detailing how discrimination against Asians and Asian-Americans due to SARS fit a historical pattern of discrimination against those peoples).

sional sports actors, a striking contrast to their popular image as strong and powerful, even indomitable. This article also illuminated how cognitive errors, social norms, and situational influences tend to better explain the behavior of professional sports actors in crises than do traditional choice models. Considering that professional sports actors are either people or comprised of people, and thus subject to the same tendencies and vulnerabilities that affect us all, their behavior in crises may also intimate how calamities shape society, and how, during those times, the law may be at its most essential.

